No. 16-658	
Title:	**Charmaine Hamer, Petitioner** v. **Neighborhood Housing Services of Chicago, et al.**
Docketed:	November 17, 2016
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(15-3764)
Decision Date:	August 31, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Nov 15 2016	Petition for a writ of certiorari filed. (Response due December 19, 2016)
Dec 14 2016	Order extending time to file response to petition to and including January 18, 2017, for all respondents.
Jan 18 2017	Brief of respondents Neighborhood Housing Services of Chicago & Fannie Mae in opposition filed.
Jan 30 2017	Reply of petitioner Charmaine Hamer filed.
Feb 01 2017	DISTRIBUTED for Conference of February 17, 2017.
Feb 21 2017	DISTRIBUTED for Conference of February 24, 2017.
Feb 27 2017	Petition GRANTED.
Mar 02 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 08 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 15, 2017.
Mar 21 2017	Motion to dispense with printing the joint appendix filed by petitioner Charmaine Hamer.

Apr 03 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Apr 11 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Fannie Mae.
Apr 19 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party , received from counsel for respondent Neighborhood Housing Services of Chicago.
May 15 2017	Brief of petitioner Charmaine Hamer filed.
May 17 2017	Brief amicus curiae of Professor Scott Dodson in support of neither party filed.
May 19 2017	Brief amicus curiae of The American Academy of Appellate Lawyers filed.
Jun 08 2017	The time to file respondents' brief on the merits is extended to and including July 31, 2017.
Jul 19 2017	SET FOR ARGUMENT on Tuesday, October 10, 2017.
Jul 31 2017	Brief of respondents Neighborhood Housing Services of Chicago, et al. filed.
Aug 01 2017	Record requested from the U.S.C.A. 7th Circuit.
Aug 09 2017	CIRCULATED
Aug 29 2017	Reply of petitioner Charmaine Hamer filed. (Distributed)
Oct 10 2017	Argued. For petitioner: Jonathan A. Herstoff, New York, N. Y. For respondents: Damien G. Stewart, Washington, D. C.
Nov 08 2017	Judgment VACATED and case REMANDED. Ginsburg, J., delivered the **opinion** for a unanimous Court.
Dec 11 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

No. 16-658

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A district court may extend the time to file a notice of appeal in a civil case "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, . . . upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). Here, upon timely motion, the district court granted Petitioner Charmaine Hamer ("Ms. Hamer") a sixty-day extension of time to file a notice of appeal. Ms. Hamer filed a notice of appeal within the time set by the district court. The United States Court of Appeals for the Seventh Circuit nevertheless *sua sponte* dismissed the appeal for lack of jurisdiction. In doing so, the Seventh Circuit concluded that it was deprived of jurisdiction because Ms. Hamer's notice of appeal was filed outside the time permitted by the Federal Rules of Appellate Procedure, which provide that "[n]o extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Fed. R. App. P. 4(a)(5)(C).

The question presented is as follows:

Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, as the Second, Fourth, Seventh, and Tenth Circuits have concluded, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, as the Ninth and D.C. Circuits have concluded, and therefore subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine.

PARTIES TO THE PROCEEDING

Petitioner is Charmaine Hamer. Ms. Hamer was plaintiff-appellant below.

Respondents are Neighborhood Housing Services of Chicago and Fannie Mae. Both were defendants-appellees below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

I. Proceedings in the District Court 2

II. Proceedings in the Seventh Circuit 3

REASONS FOR GRANTING THE WRIT 5

I. The Courts of Appeals Are Divided on Whether Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Jurisdictional Rule 5

A. This Court's Decision in *Bowles* Established that the Deadline in Federal Rule of Appellate Procedure 4(a)(6) Is Jurisdictional Because It Derives from a Statute, but Did Not Address Federal Rule of Appellate Procedure 4(a)(5)(C) ... 6

B. The Ninth and D.C. Circuits Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Does Not Implicate the Appellate Jurisdiction of a Court of Appeals Because It Does Not Derive from a Statute 8

C. The Second, Fourth, and Tenth Circuits—Like the Seventh Circuit in This Case—Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Jurisdictional Rule 10

II. The Seventh Circuit's Decision Conflicts with This Court's Precedents 11

III. This Case Is the Proper Vehicle for the Court to Address This Critical Issue 14

CONCLUSION 16

APPENDIX

Appendix A Opinion and Judgment in the United States Court of Appeals for the Seventh Circuit (August 31, 2016) ..... App. 1

Appendix B Memorandum Opinion and Order and Judgment in the United States District Court, Northern District of Illinois (September 10, 2015, entered September 14, 2015) .... App. 7

Appendix C 28 U.S.C. § 2107 ..... App. 50

Fed. R. App. P. 4 ..... App. 51

Appendix D Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal in the United States District Court for the Northern District of Illinois (October 8, 2015) ..... App. 57

Appendix E Order in the United States District Court for the Northern District of Illinois (October 8, 2015) ..... App. 60

Appendix F Notice of Appeal in the U.S. District Court for the Northern District of Illinois (December 11, 2015) ..... App. 61

Appendix G Appellees Neighborhood Housing Services of Chicago and Fannie Mae's Joint Corrected Docketing Statement in the United States Court of Appeals for the Seventh Circuit (December 30, 2015) ..... App. 62

Appendix H Order in the United States Court of Appeals for the Seventh Circuit (December 31, 2015) ..... App. 66

Appendix I Appellees' Memorandum Addressing Timeliness of Appeal in the United States Court of Appeals for the Seventh Circuit (January 8, 2016) ..... App. 68

Appendix J Order in the United States Court of Appeals for the Seventh Circuit (February 3, 2016) ..... App. 91

TABLE OF AUTHORITIES

CASES

Abel v. Sullivan,
326 F. App'x 431 (9th Cir. 2009) 9, 10

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 15

Bowles v. Russell,
551 U.S. 205 (2007) ..... *passim*

Eberhart v. United States,
546 U.S. 12 (2005) 13, 15

Freidzon v. OAO LUKOIL,
644 F. App'x 52 (2d Cir. 2016) 10, 11

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,
371 U.S. 215 (1962) 8

Henderson v. Shinseki,
562 U.S. 428 (2011) 14, 15, 16

Kontrick v. Ryan,
540 U.S. 443 (2004) ..... *passim*

Mobley v. C.I.A.,
806 F.3d 568 (D.C. Cir. 2015) 15

Owen Equip. & Erection Co. v. Kroger,
437 U.S. 365 (1978) 13

Peters v. Williams,
353 F. App'x 136 (10th Cir. 2009) 11

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 15

Scarborough v. Principi,
541 U.S. 401 (2004) 15, 16

Schacht v. United States,
398 U.S. 58 (1970) 13

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941) 13

Thompson v. Immigration & Naturalization Serv.,
375 U.S. 384 (1964) 8

Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs,
558 U.S. 67 (2009) 15

United States v. Hawkins,
298 F. App'x 275 (4th Cir. 2008) 11

Youkelsone v. Fed. Deposit Ins. Corp.,
660 F.3d 473 (D.C. Cir. 2011) 9

CONSTITUTION

U.S. Const., Art. III, § 1 13

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 2107 ..... 1, 9

28 U.S.C. § 2107(c) ..... *passim*

28 U.S.C. § 2107(c)(2) 6

29 U.S.C. § 621 2

29 U.S.C. § 626(b) 2

42 U.S.C. § 2000e 2

42 U.S.C. § 2000e-5(f)(3) 2

Fed. R. App. P. 4(a) 1

Fed. R. App. P. 4(a)(1)(A) 2

Fed. R. App. P. 4(a)(5) 11

Fed. R. App. P. 4(a)(5)(C) . . . . . *passim*

Fed. R. App. P. 4(a)(6) 6, 7, 12

Fed. R. Civ. P. 58(c)(2)(A) 2

Fed. R. Civ. P. 79(a) 2

OTHER AUTHORITIES

16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (4th ed. 2008) 15

PETITION FOR WRIT OF CERTIORARI

Petitioner Charmaine Hamer ("Ms. Hamer") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (App. 1-4) is reported at 835 F.3d 761 (7th Cir. 2016). The district court's summary-judgment decision (App. 7-47) is reported at 2015 WL 5439362 (N.D. Ill. Sept. 10, 2015). The district court's entry of judgment is found at App. 48-49. The district court's order extending Ms. Hamer's time to file a notice of appeal is found at App. 60.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 31, 2016. App. 5-6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule of Appellate Procedure 4(a)[1] and 28 U.S.C. § 2107 are reproduced at App. 50-56.

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[1] The appendix contains the version of Federal Rule of Appellate Procedure 4(a) that is in effect until December 1, 2016. The December 1, 2016 amendments to the Federal Rules of Appellate Procedure make no change to Rule 4(a)(5)(C)—the provision at issue in this case.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Ms. Hamer was terminated from her position as Intake Specialist for the Housing Services of Chicago and Fannie Mae's Mortgage Help Center (together "Respondents"), and filed suit in the United States District Court for the Northern District of Illinois against Respondents for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* App. 1-2. The district court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 626(b), and 42 U.S.C. § 2000e-5(f)(3). On September 10, 2015, the district court granted summary judgment in favor of Respondents and directed the entry of judgment accordingly. App. 7-47. Final judgment was entered on September 14, 2015.[2] App. 48-49. Accordingly, in the absence of an extension of time, a notice of appeal was due by October 14, 2015. Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from").

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[2] Although the district court's summary-judgment decision and final judgment are dated September 10, 2015, neither was entered in the district court's docket until September 14, 2015. App. 7; App. 48. Therefore, the due date for filing a notice of appeal is calculated from September 14, 2015, the day that the judgment was entered. Fed. R. App. P. 4(a)(1)(A); *see also* Fed. R. Civ. P. 58(c)(2)(A) (providing that a judgment is deemed entered when a judgment, set out in a separate document, is entered in the civil docket under Federal Rule of Civil Procedure 79(a)).

After judgment was entered, Ms. Hamer and her counsel disagreed on an appellate strategy. Therefore, on October 8, 2015—before the deadline to file a notice of appeal—Ms. Hamer's counsel filed a motion seeking: (i) to withdraw as counsel, and (ii) a sixty-day extension of time for Ms. Hamer to file a notice of appeal. App. 57-59. In seeking the sixty-day extension of time, Ms. Hamer's counsel relied on 28 U.S.C. § 2107(c), which permits a district court, "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, [to] extend the time for appeal upon a showing of excusable neglect or good cause." App. 51; App. 57-58. In this motion, Ms. Hamer's counsel explained that Ms. Hamer needed additional time to secure appellate counsel and determine an appropriate appellate strategy. App. 58. That same day, the district court granted the motion, permitting Ms. Hamer's counsel to withdraw, and expressly stating that "[t]he Court will give [Ms. Hamer] until December 14, 2015 to file a Notice of Appeal." App. 60. From then on, Ms. Hamer proceeded *pro se* in the district court, as she was unable to retain appellate counsel that she could afford. At no time did Respondents oppose or otherwise object to the extension of time that the district court granted.

On December 11, 2015—within the time set by the district court—Ms. Hamer filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. App. 61.

II. Proceedings in the Seventh Circuit

After the docketing of Ms. Hamer's appeal, Respondents submitted a Joint Corrected Docketing Statement in which Respondents noted, among other

things, that "[o]n December 11, 2015, [Ms. Hamer] timely filed a Notice of Appeal[.]" App. 64; *see also* App. 63 ("The . . . Seventh Circuit has jurisdiction over this appeal . . . in that on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal."). Nevertheless, the Seventh Circuit *sua sponte* requested that Respondents file a memorandum addressing the timeliness of Ms. Hamer's appeal. App. 66-67. More specifically, the Seventh Circuit requested that Respondents address whether Federal Rule of Appellate Procedure 4(a)(5)(C) precluded consideration of Ms. Hamer's appeal. App. 67. In response to the Seventh Circuit's order, Respondents, although seeking dismissal on nonjurisdictional grounds, admitted that Rule 4(a)(5)(C) cannot divest the Seventh Circuit of jurisdiction because this Rule does not derive from a statute. App. 71-77. After Ms. Hamer responded to Respondents' memorandum, the Seventh Circuit deferred consideration of the issue until after merits briefing. App. 91-93.

After merits briefing and oral argument, the Seventh Circuit—contrary to the arguments of all parties—concluded that the timing of Ms. Hamer's notice of appeal divested the Seventh Circuit of jurisdiction to hear the case.[3] App. 1-4. Relying on this Court's decision in *Bowles v. Russell*, 551 U.S. 205

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[3] The Seventh Circuit's decision incorrectly states that Respondents had "argu[ed] . . . that [the Seventh Circuit] lacks jurisdiction over [Ms. Hamer's] appeal." App. 2. To the contrary, Respondents, while seeking dismissal on nonjurisdictional grounds, argued extensively that noncompliance with Rule 4(a)(5)(C) could not deprive the Seventh Circuit of jurisdiction over the appeal. App. 71-77.

(2007), the Seventh Circuit concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) "limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days [from the original deadline to file a notice of appeal]," and that "[a]lthough . . . Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal, this Court simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements." App. 4. Because the Seventh Circuit concluded that it lacked jurisdiction, it never reached the merits of Ms. Hamer's appeal. Moreover, due to this jurisdictional determination, the Seventh Circuit did not address whether Respondents had forfeited or waived their right to rely on Rule 4(a)(5)(C), or whether the unique-circumstances doctrine excused Ms. Hamer's late filing.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Divided on Whether Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Jurisdictional Rule

Since this Court's decision in *Bowles*, the courts of appeals have reached divergent conclusions on whether Federal Rule of Appellate Procedure 4(a)(5)(C) is a jurisdictional rule, or whether the Rule is instead a nonjurisdictional claim-processing rule that can be forfeited upon a party's failure to timely assert a violation of the Rule. This Court's review is needed to resolve the circuit split on this important question.

A. This Court's Decision in *Bowles* Established that the Deadline in Federal Rule of Appellate Procedure 4(a)(6) Is Jurisdictional Because It Derives from a Statute, but Did Not Address Federal Rule of Appellate Procedure 4(a)(5)(C)

In *Bowles*, the appellant ("Bowles") missed his deadline to file a notice of appeal, and did not recognize the error until approximately sixty days after the expiration of the time to file a notice of appeal. *See Bowles*, 551 U.S. at 207. Accordingly, because he had not timely filed a motion to extend the time to appeal, Bowles was unable to avail himself of the first sentence of 28 U.S.C. § 2107(c), which allows a district court to extend the time for appeal "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal." 28 U.S.C. § 2107(c). Instead, because no motion was filed within 30 days of the expiration of the time to bring an appeal, Bowles' only remedy lay in the second part of 28 U.S.C. § 2107(c), which permits the district court, under certain circumstances, to "reopen the time for appeal for a period of 14 days from the entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c)(2). Consistent with the second part of 28 U.S.C. § 2107(c), Federal Rule of Appellate Procedure 4(a)(6) also provides that a district court, under certain conditions, "may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered[.]" Fed. R. App. P. 4(a)(6).

Despite the clear statutory mandate that a district court may only reopen the time to appeal for a period of 14 days under those circumstances, the district court

"inexplicably gave Bowles 17 days . . . to file his notice of appeal." *Bowles*, 551 U.S. at 207. Bowles filed his notice of appeal within the time set by the district court, "but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c)." *Id.*

This Court concluded that the Court of Appeals lacked jurisdiction over the appeal. Critical to this Court's analysis, however, is the fact that the 14-day time limit in Federal Rule of Appellate Procedure 4(a)(6) is also set forth in a statute. *See Bowles*, 551 U.S. at 210 (noting this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" and "recogniz[ing] the jurisdictional significance of the fact that a time limitation is set forth in a statute"). In no way did the Court address Federal Rule of Appellate Procedure 4(a)(5)(C), which does not derive from a statute. Indeed, the Court distinguished the case from *Kontrick v. Ryan*, 540 U.S. 443 (2004) because the time limitation at issue in *Kontrick*—although set forth in the Federal Rules of Bankruptcy Procedure—did not implicate a court's jurisdiction because it did not appear in a statute. *Bowles*, 551 U.S. at 210-11. In fact, the Court recognized that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction[.]" *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 452).

The Court further explained that equitable considerations could not excuse the tardy notice of appeal because the late filing deprived the Court of Appeals of jurisdiction. In particular, the Court concluded that "because Bowles' error [was] one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the

statute's time limitations." *Bowles*, 551 U.S. at 213. Moreover, the Court concluded that Bowles could not rely on the "'unique circumstances' doctrine" to excuse his late filing. *Id.* at 213-14. Under that doctrine—which stems from two of this Court's cases—the untimely filing of an appeal has been excused when the appellant relied on the district court's erroneous assurances about the timeliness of the appeal. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17 (1962) (excusing the late filing of a notice of appeal where the appellant had relied on the district court's erroneous extension of time to file a notice of appeal); *see also Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 385-86 (1964) (excusing the late filing of a notice of appeal where the district court had erroneously assured the appellant that post-trial motions were filed "in ample time"). Because Bowles' error deprived the Court of Appeals of jurisdiction, this Court concluded that "[it] has no authority to create equitable exceptions to jurisdictional requirements," and "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 213-14.

B. The Ninth and D.C. Circuits Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Does Not Implicate the Appellate Jurisdiction of a Court of Appeals Because It Does Not Derive from a Statute

Since this Court's decision in *Bowles*, the Ninth and D.C. Circuits have recognized that because Federal Rule of Appellate Procedure 4(a)(5)(C) does not derive

from a statute, this Rule does not limit the jurisdiction of the courts of appeals.

In a factual scenario strikingly similar to that in the present case, the D.C. Circuit in *Youkelsone v. Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011) held that it had jurisdiction over an appeal that was filed within the time set by the district court but outside the time period permitted by Federal Rule of Appellate Procedure 4(a)(5)(C). *Youkelsone*, 660 F.3d at 475-76. The D.C. Circuit found that the Rule does not implicate the jurisdiction of a court of appeals and concluded that "the Rule 4(a)(5)(C) time limit is a claim-processing rule, not a jurisdictional bar[.]" *Id.* at 475. Relying on *Kontrick*, the D.C. Circuit explained that because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction. . . . only timing rules that have a statutory basis are jurisdictional." *Youkelsone*, 660 F.3d at 475 (citations omitted). The D.C. Circuit therefore determined that "[a]lthough the authority to extend the time available to file an appeal is codified at 28 U.S.C. § 2107, Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code. Rule 4(a)(5)(C)'s thirty-day limit is thus a claim-processing rule." *Id.* The D.C. Circuit then concluded that because the appellee had not promptly challenged the timeliness of Youkelson's appeal, the appellee forfeited its right to seek dismissal of the appeal based on a violation of Rule 4(a)(5)(C). *Id.* at 476. The court then reached the merits of the appeal. *Id.*

The Ninth Circuit reached a similar conclusion in *Abel v. Sullivan*, 326 F. App'x 431 (9th Cir. 2009).

statute's time limitations." *Bowles*, 551 U.S. at 213. Moreover, the Court concluded that Bowles could not rely on the "'unique circumstances' doctrine" to excuse his late filing. *Id.* at 213-14. Under that doctrine—which stems from two of this Court's cases—the untimely filing of an appeal has been excused when the appellant relied on the district court's erroneous assurances about the timeliness of the appeal. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17 (1962) (excusing the late filing of a notice of appeal where the appellant had relied on the district court's erroneous extension of time to file a notice of appeal); *see also Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 385-86 (1964) (excusing the late filing of a notice of appeal where the district court had erroneously assured the appellant that post-trial motions were filed "in ample time"). Because Bowles' error deprived the Court of Appeals of jurisdiction, this Court concluded that "[it] has no authority to create equitable exceptions to jurisdictional requirements," and "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 213-14.

B. The Ninth and D.C. Circuits Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Does Not Implicate the Appellate Jurisdiction of a Court of Appeals Because It Does Not Derive from a Statute

Since this Court's decision in *Bowles*, the Ninth and D.C. Circuits have recognized that because Federal Rule of Appellate Procedure 4(a)(5)(C) does not derive

from a statute, this Rule does not limit the jurisdiction of the courts of appeals.

In a factual scenario strikingly similar to that in the present case, the D.C. Circuit in *Youkelsone v. Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011) held that it had jurisdiction over an appeal that was filed within the time set by the district court but outside the time period permitted by Federal Rule of Appellate Procedure 4(a)(5)(C). *Youkelsone*, 660 F.3d at 475-76. The D.C. Circuit found that the Rule does not implicate the jurisdiction of a court of appeals and concluded that "the Rule 4(a)(5)(C) time limit is a claim-processing rule, not a jurisdictional bar[.]" *Id.* at 475. Relying on *Kontrick*, the D.C. Circuit explained that because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction. . . . only timing rules that have a statutory basis are jurisdictional." *Youkelsone*, 660 F.3d at 475 (citations omitted). The D.C. Circuit therefore determined that "[a]lthough the authority to extend the time available to file an appeal is codified at 28 U.S.C. § 2107, Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code. Rule 4(a)(5)(C)'s thirty-day limit is thus a claim-processing rule." *Id.* The D.C. Circuit then concluded that because the appellee had not promptly challenged the timeliness of Youkelson's appeal, the appellee forfeited its right to seek dismissal of the appeal based on a violation of Rule 4(a)(5)(C). *Id.* at 476. The court then reached the merits of the appeal. *Id.*

The Ninth Circuit reached a similar conclusion in *Abel v. Sullivan*, 326 F. App'x 431 (9th Cir. 2009).

There, the Ninth Circuit concluded that an appellant's untimely notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(C), "does not deprive [a court of appeals] of jurisdiction because the Rule's time limitation is not derived from statute." *Abel*, 326 F. App'x at 432 (citing *Bowles*, 127 S. Ct. at 2364-65).[4]

C. The Second, Fourth, and Tenth Circuits—Like the Seventh Circuit in This Case—Have Concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Jurisdictional Rule

Contrary to the Ninth and D.C. Circuits, the Second, Fourth, and Tenth Circuits have concluded—as did the Seventh Circuit in this case—that Federal Rule of Appellate Procedure 4(a)(5)(C) is a jurisdictional constraint on the courts of appeals. Rather than recognizing that *Bowles* applies only to statutory deadlines, these courts appear to view ***all*** time limits for filing a notice of appeal in a civil case as jurisdictional in nature.

For example, in *Freidzon v. OAO LUKOIL*, 644 F. App'x 52 (2d Cir. 2016), the Second Circuit found that the district court extended the time to file a notice of appeal beyond the time permitted by Rule 4(a)(5)(C), and therefore concluded that "as the Supreme Court made clear in *Bowles v. Russell*, the time limits for filing a notice of appeal are jurisdictional and not subject to judicially created equitable exceptions."

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[4] As an additional ground for finding that it had jurisdiction over the appeal, the Ninth Circuit found that an earlier-filed motion for an extension of time qualified as the functional equivalent of a notice of appeal. *Abel*, 326 F. App'x at 432-33.

Freidzon, 644 F. App'x at 53. Accordingly, because the appellant had filed a notice of appeal within the deadline set by the district court—but outside the time period permitted by Rule 4(a)(5)(C) —the Second Circuit dismissed the appeal for lack of jurisdiction. *Id.* at 53-54.

Similarly, in *Peters v. Williams*, 353 F. App'x 136 (10th Cir. 2009), the Tenth Circuit concluded that under *Bowles*, Rule 4(a)(5)(C) is mandatory and jurisdictional, and that the district court's erroneous extension of time beyond the deadline in the Rule therefore could not excuse a late filing. *Peters*, 353 F. App'x at 137. The Tenth Circuit eventually found that it had jurisdiction over the case by determining that the appellant's timely Rule 4(a)(5) motion for an extension of time to file a notice of appeal was the functional equivalent of a notice of appeal. *Id.* at 137-138.

Finally, in *United States v. Hawkins*, 298 F. App'x 275 (4th Cir. 2008), the Fourth Circuit noted that Rule 4(a)(5)(C) is "mandatory and jurisdictional" and stated that "[e]xpiration of the time limits in Rule 4 deprives the court of jurisdiction over the case." *Hawkins*, 298 F. App'x at 275. The Fourth Circuit remanded the case for the district court to determine in the first instance whether the appellant's excusable neglect warranted an extension of time to appeal, as per the Federal Rules of Appellate Procedure. *Id.*

II. The Seventh Circuit's Decision Conflicts with This Court's Precedents

As the Seventh Circuit recognized, the relevant portion of 28 U.S.C. § 2107(c) provides that "the district

court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." App. 2-3. It is undisputed that Ms. Hamer's motion for an extension of time was filed well within the deadline set by section 2107(c), and that the statute does not limit the length of the extension that a district court can give. Nevertheless, the Seventh Circuit concluded that the time limitation in Rule 4(a)(5)(C) sets forth a limitation on appellate jurisdiction. App. 4. The Seventh Circuit's only reason for this conclusion was its statement—without further explanation—that "[l]ike Rule 4(a)(6), Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." App. 4. The Seventh Circuit did not address the fact that unlike Rule 4(a)(6), no statute imposes the time limitation set forth in Rule 4(a)(5)(C).

The Seventh Circuit's decision is squarely at odds with this Court's precedents, which have repeatedly recognized that court-promulgated rules of procedure that lack a statutory basis do not constitute a limitation on a court's jurisdiction. For example, the Seventh Circuit's decision conflicts with *Kontrick*, wherein a creditor's objection to a debtor's discharge was untimely under the Federal Rules of Bankruptcy Procedure. At issue was whether the creditor's untimely objection deprived the bankruptcy court of jurisdiction to adjudicate the creditor's objection. *Kontrick*, 540 U.S. at 446-47. The Court stated that "[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge[,]" and

concluded that the tardy filing did not deprive the bankruptcy court of jurisdiction. *Id.* at 448-52. In so concluding, this Court explained that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452 (citing U.S. Const., Art. III, § 1). The Court further recognized that "Court-prescribed rules of practice and procedure for cases in the federal district courts and courts of appeals . . . do not create or withdraw federal jurisdiction." *Id.* at 453 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)) (internal quotation marks omitted).

Similarly, in *Eberhart v. United States*, 546 U.S. 12 (2005), this Court summarily reversed the Seventh Circuit's conclusion that an untimely motion for a new trial under the Federal Rules of Criminal Procedure deprived the district court of jurisdiction over the motion. *Eberhart*, 546 U.S. at 16-20. *See also Bowles*, 551 U.S. at 210-11 (distinguishing between deadlines set forth in statutes and deadlines set forth in rules); *Schacht v. United States*, 398 U.S. 58, 64 (1970) (providing that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute").

Contrary to these precedents, the Seventh Circuit's decision attaches jurisdictional significance to Federal Rule of Appellate Procedure 4(a)(5)(C)—a court-promulgated rule—despite the fact that the Rule has no statutory counterpart.

III. This Case Is the Proper Vehicle for the Court to Address This Critical Issue

This case is an ideal vehicle for the Court to address this issue. There is no question that the Seventh Circuit viewed Rule 4(a)(5)(C) as a jurisdictional requirement, as its judgment explicitly provided that the case was being dismissed for lack of jurisdiction (App. 6), and its decision referred to the Rule as "jurisdictional." App. 4. Moreover, the Seventh Circuit explicitly recognized that "Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal[.]" App. 4. Nevertheless, the Seventh Circuit did not permit any equitable considerations to factor into its analysis because it viewed the Rule as a jurisdictional requirement. App. 4. Accordingly, the question of Rule 4(a)(5)(C)'s jurisdictionality is cleanly presented here.

The question of Rule 4(a)(5)(C)'s jurisdictionality is important. As this Court has recognized, the question of whether a timing requirement is jurisdictional "is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). This is because a jurisdictional rule can be raised at any time by any party, and can even be raised *sua sponte* by a court. *Id.* at 434-35. Moreover, jurisdictional requirements are not subject to equitable considerations such as forfeiture, waiver, and the unique-circumstances doctrine. *Bowles*, 551 U.S. at 213-14. In sharp contrast, nonjurisdictional claim-processing rules can "be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456.

Additionally, the unique-circumstances doctrine may excuse noncompliance with a deadline "where a party acted belatedly in reliance on an erroneous district court ruling." *Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015). Although *Bowles* abrogated the unique-circumstances doctrine with respect to jurisdictional deadlines, the doctrine remains applicable to nonjurisdictional claim-processing rules. *Mobley*, 806 F.3d at 577 (noting that *Bowles* "left open the doctrine's continued vitality as an exception to a non-jurisdictional rule" and applying the doctrine); *see also* 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3950.1 (4th ed. 2008) (noting that the unique-circumstances doctrine remains viable for nonjurisdictional claim-processing rules).

Because the issue of jurisdictionality is important, this Court—both before and after *Bowles*—has repeatedly intervened to determine whether particular requirements are jurisdictional in nature. *See, e.g.*, *Henderson*, 562 U.S. 428 (addressing jurisdictionality of the deadline to appeal from the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (considering jurisdictionality of registration requirement in copyright cases); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67 (2009) (determining jurisdictionality of procedural rules established by the National Railroad Adjustment Board); *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (deciding jurisdictionality of employee numerosity requirement in Title VII of the Civil Rights Act of 1964); *Eberhart*, 546 U.S. 12 (reviewing jurisdictionality of deadline in Federal Rules of Criminal Procedure); *Scarborough v. Principi*, 541 U.S.

401 (2004) (evaluating jurisdictionality of timing requirement in Equal Access to Justice Act); *Kontrick*, 540 U.S. 443 (assessing jurisdictionality of deadline in Federal Rules of Bankruptcy Procedure). However, this Court has not yet addressed whether Federal Rule of Appellate Procedure 4(a)(5)(C) is jurisdictional in nature. This Court's clarification is needed to determine whether Rule 4(a)(5)(C) should be permitted to "alter[] the normal operation of our adversarial system" by being "[b]rand[ed] . . . as going to a court's subject-matter jurisdiction." *Henderson*, 562 U.S. at 434.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion and Judgment in the United States Court of Appeals for the Seventh Circuit (August 31, 2016) . . . . . App. 1

Appendix B Memorandum Opinion and Order and Judgment in the United States District Court, Northern District of Illinois (September 10, 2015, entered September 14, 2015) . . . . App. 7

Appendix C 28 U.S.C. § 2107 . . . . . App. 50

Fed. R. App. P. 4 . . . . . App. 51

Appendix D Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal in the United States District Court for the Northern District of Illinois (October 8, 2015) . . . . . App. 57

Appendix E Order in the United States District Court for the Northern District of Illinois (October 8, 2015) . . . . . App. 60

Appendix F Notice of Appeal in the U.S. District Court for the Northern District of Illinois (December 11, 2015) . . . . . App. 61

Appendix G Appellees Neighborhood Housing Services of Chicago and Fannie Mae's Joint Corrected Docketing Statement in the United States Court of Appeals for the Seventh Circuit (December 30, 2015) . . . . . App. 62

Appendix H Order in the United States Court of Appeals for the Seventh Circuit (December 31, 2015) . . . . . App. 66

Appendix I Appellees' Memorandum Addressing Timeliness of Appeal in the United States Court of Appeals for the Seventh Circuit (January 8, 2016) . . . . . App. 68

Appendix J Order in the United States Court of Appeals for the Seventh Circuit (February 3, 2016) . . . . . App. 91

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15-3764

[Filed August 31, 2016]

CHARMAINE HAMER,
Plaintiff-Appellant,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:12-cv-10150 — **Rubén Castillo**, *Chief Judge*.

ARGUED JUNE 2, 2016 — DECIDED AUGUST 31, 2016

Before POSNER and SYKES, *Circuit Judges* and YANDLE, *District Judge*.*

YANDLE, *District Judge*. Charmaine Hamer, a former Intake Specialist for the Housing Services of Chicago ("NHS") and Fannie Mae's Mortgage Help Center ("Fannie Mae") (together "Appellees"), filed suit against her former employers, alleging violations of the

* Of the Southern District of Illinois, sitting by designation.

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended. The district court granted summary judgment in favor of NHS and Fannie Mae on September 14, 2015. As such, pursuant to Fed. R. App. P. 4(a)(1)(A) and 28 U.S.C. § 2107(a), the original deadline for Hamer to file her Notice of Appeal was October 14, 2015.

On October 8, 2015, Hamer's counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal" in which she requested an extension to December 14, 2015 for Hamer to file her Notice of Appeal. The district court granted the motion and extended the deadline to December 14, 2015.

Hamer filed her Notice of Appeal with this Court on December 11, 2015; within the timeframe permitted by the district court's Order, but exceeding the extension allowable under Fed. R. App. P. 4(a)(5)(C) which provides: "No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later."

On December 31, 2015, we, *sua sponte*, entered an Order instructing the Appellees to file a brief addressing the timeliness of this appeal. They did so, arguing that Hamer's Notice of Appeal is untimely under Rule 4(a)(5)(C) and, therefore, that this Court lacks jurisdiction over her appeal.

Hamer asserts that the district court extended the time to file her Notice of Appeal pursuant 28 U.S.C. § 2107(c), which states in relevant part: "[T]he district court may, upon motion filed not later than 30 days

after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." She contends that Rule 4(a)(5)(C) does not apply since the district court did not consider it when granting the extension. Hamer further argues that the Appellees waived their timeliness challenge by not initially raising it.

The Supreme Court has consistently held that the statutory requirement for filing a timely notice of appeal is "mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 207, 209, 127 S. Ct. 2360, 2362, 168 L. Ed. 2d 96 (2007). In *Bowles*, the Court explained the relationship between the statutory filing period set forth in § 2107(a) and the district court's authority to extend that period under § 2107(c) and Rule 4:

> According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period...Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days... *Id.* at 208. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). *Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than*

> *a simple 'claim-processing rule.'* (emphasis added). As we have long held, when an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.' *Id.* at 213. (internal citation omitted).

Like Rule 4(a)(6), Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days. Thus, the district court was in error when it granted Ms. Hamer an extension that exceeded the Rule 4(a)(5)(C) time period by almost 30 days.

Although we recognize that Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal, this Court simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements. *See Bowles* at 214. Therefore, Hamer's Notice is untimely.

Finally, Hamer's argument that the Appellees waived the issue of the timeliness of her appeal also fails. When a filing error is one of "jurisdictional magnitude", forfeiture or waiver cannot excuse the lack of compliance with the statute's time limitation." *See Bowles* at 213. Had the Appellees never challenged the timeliness of Hamer's Notice, they could not waive what this Court is bound by statute to uphold. Accordingly, because we have no jurisdiction to consider Hamer's appeal on the merits, it is dismissed.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15-3764

[Filed August 31, 2016]

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

August 31, 2016

Before: RICHARD A. POSNER, Circuit Judge

DIANE S. SYKES, Circuit Judge

STACI M. YANDLE, District Court Judge*

CHARMAINE HAMER, Plaintiff - Appellant	)
v.	)
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et. al., Defendants - Appellees	)

* Of the Southern District of Illinois, sitting by designation.

Originating Case Information:

District Court No: 1:12-cv-10150
Northern District of Illinois, Eastern Division
District Judge Ruben Castillo

The appeal is DISMISSED, with costs, for lack of jurisdiction, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 12 C 10150
Chief Judge Rubén Castillo

[Filed September 10, 2015,
Entered September 14, 2015]

CHARMAINE HAMER,
Plaintiff,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO and FANNIE MAE,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Charmaine Hamer brings this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, against Neighborhood Housing Services of Chicago ("NHS") and Fannie Mae (collectively, "Defendants"), alleging age discrimination, sex discrimination, and retaliation. Presently before the Court are Defendants' separate motions for summary judgment pursuant to

Federal Rule of Civil Procedure 56. For the reasons stated below, the Court grants Defendants' motions.

RELEVANT FACTS[1]

Plaintiff is a sixty-five-year-old female, (R. 98, NHS's Rule 56.1 Resp. ¶ 1; R. 46, Pl.'s Am. Compl. ¶ 3), who was employed by NHS, (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 2). NHS is a nonprofit neighborhood revitalization organization that creates opportunities for people to live in affordable homes throughout the Chicagoland area. (*Id.* ¶ 1.) Fannie Mae, formally known as the Federal National Mortgage Association, is a federally chartered, shareholder-owned, private corporation that provides financial products and services to low-, moderate-, and middle-income families to help them buy homes. (R. 90, Pl.'s Rule 56.1 Resp. to FM ¶ 1.) During the relevant period, Fannie Mae in partnership with NHS operated the Fannie Mae Mortgage Help Center ("MHC") located at 1 S. Wacker Drive, Chicago, Illinois. (*Id.* ¶ 2.) NHS employed all staff personnel at MHC with the exception of the Fannie Mae Site Manager and Program Manager. (*Id.* ¶ 3.)

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[1] The Court takes the facts from the parties' Local Rule 56.1 statements of material facts. (R. 83, NHS's Local Rule 56.1(a)(3) Statement of Material Facts ("NHS's Facts"); R. 88, Fannie Mae's Local Rule 56.1(a)(3) Statement of Material Facts ("FM's Facts"); R. 89, Pl.'s Local Rule 56.1(b)(3)(C) Statement of Material Facts ("Pl.'s Facts"); R. 90, Pl.'s Response to FM's Facts ("Pl.'s Rule 56.1 Resp. to FM"); R. 91, Pl.'s Response to NHS's Facts ("Pl.'s Rule 56.1 Resp. to NHS"); R. 98, NHS's Response to Pl.'s Facts ("NHS's Rule 56.1 Resp."); R. 99, FM's Response to Pl.'s Facts ("FM's Rule 56.1 Resp.").)

I. Plaintiff's Employment at MHC

Plaintiff began working for NHS as a temporary employee in 2009, and she was promoted to a full-time position as an Intake Specialist in June 2010. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 2.) As an Intake Specialist, Plaintiff was staffed at MHC. (*Id.* ¶ 5.) Upon her promotion, Plaintiff received an offer letter setting forth the terms and conditions of the position. (*Id.* ¶ 6.) The letter informed Plaintiff that the position of Intake Specialist was contingent on the renewal of a contract between NHS and Fannie Mae, and that Fannie Mae had the right to remove her from the position for any reason. (*Id.* ¶ 6.) As an Intake Specialist, Plaintiff was responsible for receiving initial calls from borrowers and obtaining the information necessary for a mortgage counselor to properly serve the borrower. (*Id.* ¶ 7.) Additionally, NHS expected Plaintiff to demonstrate regular attendance and punctuality, interpersonal skills, teamwork, professionalism, and oral communication. (*Id.* ¶¶ 9, 10.) Plaintiff understood that all of these competencies constituted NHS's expectation of her performance. (*Id.* ¶ 10.)

Plaintiff's direct supervisor at MHC was Toya Glenn, an NHS Counseling Manager/Senior Foreclosure Prevention Specialist. (*Id.* ¶ 11.) Glenn worked closely with the Fannie Mae Site Manager and Program Manager at MHC. (*Id.* ¶ 12) From approximately June 2010 through September 2011, Glenn worked with Site Manager Nicole Evans, and from approximately September 2011 through September 2012, Glenn worked with Site Manager Mark Green. (*Id.* ¶ 13.) During this entire period,

Glenn also worked with Program Manager Erich Ludwig. (*Id.*)

II. Plaintiff's Performance Issues

In December 2010, Plaintiff was tardy on several occasions. (*Id.* ¶ 14.) As a result, Site Manager Evans informed Plaintiff of the expectation that everyone get to work on time and the "need for everyone to put in a full eight-hour day." (*Id.*) In April 2011, NHS Counseling Manager Glenn met with Plaintiff because she had been tardy on seven different occasions between March and April 2011. (*Id.* ¶ 15.) Plaintiff explained to Glenn that her tardiness was a result of having to take two buses and a train to get to work. (*Id.*) Glenn suggested that Plaintiff take an earlier train or bus, and Plaintiff responded that she did not "have any more time to give Fannie Mae." (*Id.* ¶ 16.) Glenn reiterated to Plaintiff NHS's expectation that she arrive to work on time, and Plaintiff confirmed that she understood this expectation. (*Id.*) Shortly thereafter, Glenn and Linda Anderson, NHS's director of Human Resources at the time, met with Plaintiff to reiterate NHS's expectations regarding attendance. (*Id.* ¶ 17.)

Plaintiff continued to arrive late to work on numerous occasions, each time identifying a reason for her tardiness. (*Id.* ¶ 18.) Plaintiff was late to work on July 18, 2011, because she took the wrong train, and on July 19, 2011, because of a rainstorm or high winds. (*Id.*) Plaintiff was late again on August 4, 8, and 9, 2011, because out-of-town guests were staying in her home. (*Id.*) However, Plaintiff previously told Glenn that she would be late on those dates and Glenn indicated that her tardiness would not be a problem.

(R. 98, NHS's Rule 56.1 Resp. ¶ 5.) Plaintiff was also late on September 27 and 28, 2011, and on October 4, 2011, because of changes to the train schedule. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 18.) Glenn met with Plaintiff again on October 4, 2011, to discuss Plaintiff's tardiness. (*Id.* ¶ 19.) At that meeting, Glenn reminded Plaintiff of NHS's attendance policy and warned her that she would receive a written warning in the future if her attendance issues continued. (*Id.* ¶¶ 19-20.) Plaintiff promised that she would correct her attendance issues moving forward. (*Id.* ¶ 20.) Between October 4, 2011, and March 14, 2012, the date Plaintiff's employment with NHS ended, Plaintiff was not late to work. (R. 98, NHS's Rule 56.1 Resp. ¶ 7.)

NHS was also concerned with Plaintiff's communication and interaction with others at work. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶¶ 21-24.) In July 2011, Glenn met with Plaintiff to discuss four different occasions in which Glenn felt that Plaintiff had been disrespectful or inappropriate. (*Id.* ¶¶ 21-22.) Glenn provided Plaintiff with examples from December 2010, January 2011, February 2011, and June 2011. (*Id.* ¶ 22.)

At a meeting in December 2010, Plaintiff told Glenn that she "really didn't want to hear any more about that action plan [the topic of the meeting] until they figured out how to really do it." (*Id.*; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 66:18-22.) Plaintiff testified in her deposition that she intended this comment to be a joke, but she understood after her meeting with Glenn in July 2011 that Glenn found the comment to be disrespectful. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R.83-2, Ex. B Part 1, Pl.'s Dep. at 66:18-67:14.)

In January 2011, Evans expressed that she was anxious about the Counselors' production numbers for that month and told Plaintiff and her co-worker Javier Vasquez that they "really had to get on the ball . . . because . . . our numbers had been bad for December." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 73:03-06.) Plaintiff replied that she was "really not concerned" about the production goals for the Counselors because the Intake Specialists' production numbers were good. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22.) Plaintiff also told Evans that she was not concerned about what their boss Ludwig thought of the production numbers because "[she] was doing [her] job" and "that's really ya'lls . . . concern." (*Id.*; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 76:03-04.)

In February 2011, Plaintiff had another exchange with Evans about deleting old client files. (R. 98, NHS's Rule 56.1 Resp. ¶ 9.) Evans told Plaintiff that she wanted to delete old files of clients who had been deactivated, and Plaintiff explained to Evans why she did not think that was a "good idea." (*Id.*) Evans did not agree with Plaintiff, and proceeded to ask her to shred the old files. (*Id.*) Plaintiff told Evans that she "would need that in writing before [she] shred a file." (*Id.*; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 89:13-17.) Evans suggested that they go talk to Glenn to see how she wanted the files handled. (R. 98, NHS's Rule 56.1 Resp. ¶ 11.) Evans proceeded to tell Glenn that Plaintiff was challenging her authority, which upset Plaintiff and made her cry. (*Id.*) Plaintiff admitted in her deposition that after this conversation, she understood that Evans believed that she had been insubordinate. (*Id.*)

Finally, in June 2011, when Glenn denied Plaintiff's time off request "because it was the end of the month and [they] needed to reach [their] [production] goals," Plaintiff replied, "my work doesn't have anything to do with production goals." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 80:18-81:20.) When Glenn reiterated that she needed Plaintiff to work, Plaintiff replied that "other people take off at the end of the month and it doesn't seem like production is a consideration." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22; R . 83-2, Ex. B Part 1, Pl.'s Dep. at 81:20-82:07.) Glenn told Plaintiff that her comments were inappropriate, and Plaintiff apologized. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22.)

After discussing these four instances during the July 2011 meeting, Glenn informed Plaintiff that she did not feel respected as a supervisor. (*Id.* ¶ 23.) Glenn counseled Plaintiff on the need to manage her communication, suggesting some alternative ways to say things so that they would not be taken negatively. (*Id.*) Glenn also informed Plaintiff that Ludwig was aware of the conversation that had occurred between Plaintiff and Evans in February 2011 and thought that Plaintiff was disrespectful. (*Id.* ¶ 24.) Glenn explained to Plaintiff that Ludwig wanted to remove her from MHC, but that Glenn fought for Plaintiff to remain. (*Id.* ¶ 24.) Following this July 2011 meeting, Plaintiff understood that she should discuss any concerns she had regarding the policies or procedures at MHC directly with Glenn. (*Id.* ¶ 25.)

On December 20, 2011, Plaintiff received a performance review covering the employment period of June 25, 2010, through June 25, 2011. (R. 98, NHS's

Rule 56.1 Resp. ¶ 14.) In this review, Plaintiff received an overall "Manager Appraisal Score" of 3.9 out of a possible score of 5.0, and an overall rating of "Exceeds Expectations." (*Id.*; R. 89-1, Ex. 5, Performance Review at 77.) Plaintiff was assessed based on four groups of "Core Factors." (R. 89-1, Ex. 5, Performance Review at 77-81.) For the first group of Core Factors—Achievement, Productivity/Time Management, and Accountability—Plaintiff received an "Exceeds Performance Measures." (R. 98, NHS's Rule 56.1 Resp. ¶ 14.) As to the Achievement factor, Glenn noted that Plaintiff "has played an [sic] significant role in our production relating to the number of files complete[d]" and that she "managed our intake files independently for the months of January and February." (*Id.*) Glenn also noted that from January 2011 to June 2011, Plaintiff's average number of completed files "exceeded her peers." (*Id.*) Under the "Manager Summary Comments," Glenn stated that "[w]hile [Plaintiff] has exceeded the expectations in certain areas as outlined above, [Plaintiff] needs to understand that attendance and being tactful in her communication is just as critical to her success as the other measures." (*Id.*)

III. The Counselor/Foreclosure Prevention Specialist Position at MHC

Plaintiff first applied for the position of Counselor/Foreclosure Prevention Specialist in October 2011, but was not selected for the position.[2] (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 26.) In early 2012, another

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[2] Plaintiff is not alleging in this lawsuit that NHS's decision not to select her for this position was discriminatory. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 26.)

position for Counselor/Foreclosure Prevention Specialist ("the Counselor position") opened at MHC. (*Id.* ¶ 27.) Plaintiff learned about the Counselor position on February 3, 2012, while meeting with Glenn. (*Id.* ¶ 28.) Glenn advised Plaintiff that she would not be considered for the Counselor position because Ludwig was concerned about her performance. (*Id.* ¶ 28.) Despite Glenn's feedback, Plaintiff submitted her application for the Counselor position on February 4, 2012. (*Id.* ¶ 29.) The advertised salary for the Counselor position was $42,000. (*Id.*)

Glenn and Robin Coffey, NHS's Assistant Deputy Director who is sixty years old, were responsible for selecting a candidate for the Counselor position. (*Id.* ¶¶ 30-31.) Plaintiff was considered for the Counselor position, along with two other Intake Specialists at MHC: Kade Simmons (male) and Michae Hicks (female). (*Id.* ¶ 32.) In making the promotion decision, Glenn and Coffey considered the candidates' performance as Intake Specialists, as measured by their production numbers, as well as their attitude, demeanor, and ability to work well with team members. (*Id.* ¶¶ 33, 35.)

Glenn reviewed data from Fannie Mae showing the total number of phone calls handled by each Intake Specialist in 2011. (*Id.* ¶ 34.) The data revealed that Simmons handled a total of 5,732 calls as compared to Plaintiff who handled 3,982 calls, despite the fact that Simmons did not join MHC until May 2011. (*Id.*) Additionally, the 2011 Production Log demonstrates that Simmons completed a higher number of files in three of the four months that his production numbers were counted as compared to Plaintiff. (R. 98, NHS's

Rule 56.1 Resp. ¶ 16; R. 89-1, Ex. 3, 2011 Production Log at 18.) Specifically, Simmons completed more files than Plaintiff in September 2011 (39 files to Plaintiff's 30 files), October 2011 (50 files to Plaintiff's 43 files), and November 2011 (42 files to Plaintiff's 32 files); Plaintiff completed more files than Simmons in December 2011 (43 files to Simmons' 36 files). (R. 98, NHS's Rule 56.1 Resp. ¶ 16.)

Glenn and Coffey also considered Plaintiff's pattern of tardiness and communication issues. (*Id.* ¶ 36.) They did not believe that Plaintiff had sufficiently improved her communication skills in order to take on a role that required increased managerial responsibility. (*Id.*) Conversely, Glenn and Coffey found that Simmons was a consummate team player, had a positive attitude, and worked well with both his co-workers and supervisors. (*Id.* ¶ 37.)

In reaching a decision, Glenn also asked Site Manager Green for his feedback concerning the opening for the Counselor position. (R. 90, Pl.'s Rule 56.1 Resp. to FM ¶ 14.) Green advised Glenn that he believed that Simmons was best qualified for the position because "his performance metrics exceeded the other Intake Specialists." (*Id.*) Green further informed Glenn that Simmons' "collegial attitude best suited him for the customer-facing Counselor/Foreclosure Prevention Specialist position." (*Id.*) As a result of their own observations and the feedback from Green, Glenn and Coffey selected Simmons for the Counselor position. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 42.)

On February 7, 2012, Plaintiff e-mailed Fannie Mae's Program Manager Ludwig to request additional feedback as to what "[led him] to believe that [she]

would not be a good fit for the open counselor position." (*Id.* ¶ 43.) Plaintiff copied Glenn on this e-mail. (*Id.*) Ludwig forwarded Plaintiff's e-mail to Coffey that same day and expressed his desire that the NHS management team communicate to Plaintiff the reasons behind their decision with "clear transparency around [her] performance issues." (*Id.* ¶ 44.) On February 8, 2012, Plaintiff met with Glenn to discuss the e-mail she sent to Ludwig the day before. (R. 98, NHS's Rule 56.1 Resp. ¶ 19; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 137:17-138:09.) Plaintiff requested this meeting because she felt that she needed to explain to Glenn the reason she e-mailed Ludwig, specifically that she felt that Ludwig "had some misinformation on [her]." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 46; R. 83-2, Ex. B Part 1, Pl.'s Dep. at 140:09-23.) At the meeting, Glenn reviewed Plaintiff's personnel file, including the attendance and communication issues previously discussed. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 47.) Glenn told Plaintiff that "she did not feel that [Plaintiff] had established enough of a track record in [her] attendance and communication skills" to qualify her for a promotion to the Counselor position. (*Id.*; R. 83-2, Ex. B. Part 1, Pl.'s Dep. at 143:05-10.) Glenn further informed Plaintiff that it was not appropriate for her to have sent the February 7, 2012 e-mail to Ludwig. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 48.) Glenn was concerned because she had specifically directed Plaintiff to bring any issues Plaintiff had regarding Fannie Mae processes or procedures directly to her, rather than raise them first to Fannie Mae personnel. (*Id.* ¶ 45.) Glenn felt that the e-mail was contrary to her instructions. (*Id.*)

On February 14, 2012, Glenn prepared a rough draft of a Career Progression Plan "to aid [Plaintiff] in her professional development." (R. 98, NHS's Rule 56.1 Resp. ¶ 21 ; R. 89-3, Ex. 3, Career Progression Plan at 2-3.) The finalized document was sent to NHS's Human Resources Director Anderson via e-mail on February 27, 2012. (R. 98, NHS's Rule 56.1 Resp. ¶ 22; R. 89-4, Ex. 4, Finalized Career Progression Plan at 2-4.) The Career Progression Plan outlined Plaintiff's current status regarding her areas for improvement and recommended a plan for her to apply to other counseling roles with the NHS office. (R. 98, NHS's Rule 56.1 Resp. ¶ 23; R. 89-4, Ex. 4, Finalized Career Progression Plan at 3.)

IV. Plaintiff's Internal Complaint

On February 24, 2012, Plaintiff scheduled a meeting with Anderson for February 27, 2012, to discuss her concerns regarding the hiring process for the Counselor position. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 49.) Plaintiff e-mailed Glenn on the day of the meeting to inform her that she was going to meet with Anderson. (*Id.* ¶ 50.) Plaintiff met with Anderson in Anderson's office at the NHS Central Office; only Plaintiff and Anderson were present at this meeting. (*Id.* ¶ 51.) Plaintiff told Anderson that she felt that she had been discriminated against based on her age and sex in not being selected for the Counselor position. (*Id.* ¶ 52.) Plaintiff also told Anderson that she believed that Simmons obtained the position because he spent time socially with Green. (*Id.* ¶ 53.) Plaintiff advised Anderson that she had scheduled an appointment with the Equal Employment Opportunity Commission ("EEOC") for later that week. (*Id.* ¶ 52.) Anderson told

Plaintiff that she would be leaving town that week to attend a meeting in California, but that she would investigate Plaintiff's complaint. (*Id.* ¶ 54) On February 28, 2012, Anderson had a telephone conversation with Glenn inquiring as to the reason why Plaintiff was not selected for the Counselor position. (*Id.* ¶ 55.) Glenn informed Anderson that Plaintiff's performance issues prevented her from being selected for the position. (*Id.*) Plaintiff did not overhear any part of the telephone conversation between Anderson and Glenn. (*Id.* ¶ 56.)

Anderson attests that she never informed Glenn, Coffey, or any other employee of NHS or Fannie Mae that Plaintiff had alleged that the promotion decision was discriminatory or that Plaintiff had an appointment with the EEOC; Glenn, Coffey, and Green all confirm that they had no knowledge of Plaintiff's internal complaint or EEOC appointment. (*Id.* ¶ 57.) Additionally, Plaintiff testified in her deposition that she had no personal knowledge that Anderson informed anyone at Fannie Mae about her complaint. (*Id.* ¶ 58.) Plaintiff further testified that she never complained to any supervisor or manager at NHS, aside from Anderson, that she believed that she had been discriminated against based on her age or sex in not being selected for the Counselor position. (*Id.* ¶ 59.) However, Plaintiff alleges that Anderson took notes during their meeting on February 27, 2012, and that Anderson created a file on her subsequent investigation of her discrimination complaint. (R. 98, NHS's Rule 56.1 Resp. ¶ 26.)

V. Plaintiff's "Voluntary Resignation" from NHS

Site Manager Green attests that after Simmons had been promoted to the Counselor position, he observed that Plaintiff's attitude continued to be confrontational. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 61.) He observed that Plaintiff "made inappropriate communications to coworkers and supervisors, resisted following her managers' instructions, and became increasingly disruptive to the work environment" at MHC. (*Id.*) Green attests that he was disappointed to learn about Plaintiff's e-mail to Ludwig because he was aware that Plaintiff had been counseled that she should raise any concerns to NHS personnel and not to Fannie Mae personnel. (*Id.* ¶ 62.) Green expressed his concerns about Plaintiff's demeanor, performance, and confrontational attitude to Glenn. (*Id.* ¶ 63.) Glenn and Coffey attest that based on the concerns raised by Green and other Fannie Mae personnel, and based on Glenn's own concerns about Plaintiff's demeanor, they determined that NHS could not continue to staff Plaintiff at MHC. (*Id.* ¶ 64.) In early March 2012, Coffey informed Anderson that Plaintiff would be removed from MHC. (*Id.* ¶ 65.) Anderson had no involvement in the decision to remove Plaintiff, nor did Coffey or Glenn seek her input before making the decision. (*Id.* ¶ 66.)

On March 5, 2012, Anderson contacted Plaintiff and asked her to report to the NHS Central Office the following day. (*Id.* ¶ 67.) Beginning on March 6, 2012, Plaintiff reported to Anderson at the NHS Central Office and was assigned temporary tasks to perform, including assisting the Development Department with

an upcoming dinner. (*Id.* ¶ 68.) Plaintiff continued to be paid at the same rate as an Intake Specialist. (*Id.*) On March 6, 2012, Plaintiff received a text message from Simmons saying how sorry he was to find out that she would not be working at MHC. (*Id.* ¶ 69; R. 98, NHS's Rule 56.1 Resp. ¶ 35.) The next day, Plaintiff asked Anderson about the message she received from Simmons, and Anderson confirmed that NHS had removed Plaintiff from the Fannie Mae contract. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 69.)

On March 12, 2012, Anderson informed Plaintiff that there were only two open positions at NHS: a Neighborhood Director position and an Administrative Assistant position. (*Id.* ¶ 71.) Anderson advised Plaintiff that she was not qualified for the Neighborhood Director position; nevertheless, Plaintiff applied for the position. (*Id.* ¶ 72.) On March 13, 2012, Anderson and Deborah Moore, NHS Associate Director of Neighborhood Strategy and Planning, interviewed Plaintiff for the Neighborhood Director position. (*Id.* ¶ 73.) The next day, Anderson informed Plaintiff that she had not been selected to interview further for the position,[3] and that the only remaining position was the Administrative Assistant position in NHS's West Humboldt Park office. (*Id.* ¶¶ 73,76.) Anderson further explained to Plaintiff that if she refused to accept the Administrative Assistant position, she would be considered to have voluntarily resigned her employment with NHS. (*Id.* ¶ 77.) Plaintiff declined the position because it paid $23,000 per year, which would

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[3] Plaintiff is not alleging in this lawsuit that NHS's decision not to select her for the Neighborhood Director position was discriminatory. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 75.)

have resulted in a 25 percent pay reduction, and required additional travel expenses to commute to the job location. (R. 98, NHS's Rule 56.1 Resp. ¶¶ 36, 39.)

Sometime after her meeting with Anderson on March 14, 2012, Plaintiff looked on NHS's website to see if there were any other positions open at NHS. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 79.) At the time, a Homeownership or Account Housing Counselor position and a Customer Service Representative position were open; however, Plaintiff did not apply for either position. (*Id.* ¶ 79.) Eventually, Plaintiff received a letter from Anderson dated April 3, 2012, confirming her voluntary resignation from NHS. (*Id.* ¶ 80.)

PROCEDURAL HISTORY

Plaintiff initiated this action on December 19, 2012. (R. 1, Compl.) Plaintiff requested that counsel be appointed, (R. 4, Pl.'s Mot. for Counsel), and the Court granted her request on April 3, 2013, (R. 6, Min. Entry). Plaintiff's attorney later moved for relief from her appointment, (R. 29, Mot. for Relief), and the Court granted counsel's motion and appointed a second counsel to represent Plaintiff, (R. 32, Order; R. 35, Min. Entry). However, due to a conflict of interest, Plaintiff's second counsel subsequently sought to withdraw, (R. 37, Mot. to Withdraw), and the Court granted counsel's motion and appointed Douglas M. Werman of Werman Law Office to represent Plaintiff on October 1, 2013, (R. 39, Order). On November 27, 2013, Plaintiff filed a four-count amended complaint. (R. 46, Am. Compl.) In Count I, Plaintiff alleges discrimination on the basis of age in violation of the ADEA, (*id.* ¶¶ 56-60); in Count II, she alleges discrimination on the basis of sex in violation of Title VII, (*id.* ¶¶ 61-65);

in Count III, she alleges retaliation in violation of the ADEA, (*id.* ¶¶ 66-70); and in Count IV, she alleges retaliation in violation of Title VII, (*id.* ¶¶ 71-75). NHS answered Plaintiff's amended complaint on December 23, 2013, (R. 47, NHS's Ans.), and Fannie Mae answered the complaint on December 24, 2014, (R. 48, FM's Ans.). Defendants separately moved for summary judgment on February 25, 2015. (R. 80, NHS's Mot. Summ. J.; R. 84, FM's Mot. Summ. J.) Plaintiff responded to both of Defendants' motions for summary judgment on May 1, 2015. (R. 88, Pl.'s Mem.) Defendants separately replied to Plaintiff's memorandum in opposition to summary judgment on May 29, 2015. (R. 96, NHS's Reply; R. 97, FM's Reply.)

LEGAL STANDARD

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law." *Hampton v. Ford Motor Co.*, 561 F.3d 709, 713 (7th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In determining whether a genuine issue of material fact exists, the Court must view the evidence and draw all reasonable inferences in favor of the party opposing the motion. *Id.* at 255; *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011) ("[D]istrict courts are not required to draw every requested inference; they must only draw

reasonable ones that are supported by the record."). The moving party has the initial burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). The moving party "can prevail just by showing that the other party has no evidence on an issue on which that party has the burden of proof." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993).

Once the moving party has met this burden, the nonmoving party "must come forward with specific facts demonstrating that there is a genuine issue for trial." *Wheeler*, 539 F.3d at 634. "The existence of a mere scintilla of evidence, however, is insufficient to fulfill this requirement." *Id.* (citing *Anderson*, 477 U.S. at 251-52). The nonmoving party may not rely on "mere conclusions and allegations" to create a genuinely disputed issue of material fact. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 320 (7th Cir. 2003). Instead, the nonmoving party "must make a showing sufficient to establish any essential element of her cause of action for which she will bear the burden of persuasion at trial." *Smith ex rel. Smith v. Severn*, 129 F.3d 419, 425 (7th Cir. 1997); *see also Celotex*, 477 U.S. at 322-23. Weighing evidence and making credibility decisions are jury functions, and it is not appropriate for a judge to assume those functions when ruling on a motion for summary judgment. *Anderson*, 477 U.S. at 255. Accordingly, the Court "appl[ies] the summary judgment standard with special scrutiny to employment discrimination cases, which often turn on issues of intent and credibility." *Krchnavy*

v. Limagrain Genetics Corp., 294 F.3d 871, 875 (7th Cir. 2002).

ANALYSIS

I. Plaintiff's Age and Sex Discrimination Claims (Counts I and II)

In Counts I and II, Plaintiff alleges that, in failing to promote her to the Counselor position in February 2012, Defendants discriminated against her based on her age and sex in violation of the ADEA and Title VII. (R. 46, Am. Compl. ¶¶ 58-59, 63-64.) The ADEA forbids employers from discriminating against their employees "with respect to [their] compensation, terms, conditions, or privileges of employment" on the basis of age. 29 U.S.C. § 623(a)(1). Similarly, Title VII makes it unlawful for employers to discriminate against their employees on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Discrimination claims under the ADEA and Title VII are analyzed in the same manner, and this Court will therefore analyze both claims together. *See Hutt v. AbbVie Products, L.L.C.*, 757 F.3d 687, 691 (7th Cir. 2014); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008).

A plaintiff may prove discrimination under the ADEA and Title VII through the direct or indirect methods of proof.[4] *Hutt*, 757 F.3d at 691 (citation

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[4] The Supreme Court has held that to prevail under the ADEA, a plaintiff must show that age was the but-for cause of the adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). Post-*Gross*, the Seventh Circuit continues to apply the direct and indirect methods when analyzing ADEA claims. *See Fleishman v. Continental Cas. Co.*, 698 F.3d 598, 604 (7th Cir.

omitted). A plaintiff may prevail under the direct method of proof either by presenting direct evidence of intentional discrimination or "by constructing a 'convincing mosaic' of circumstantial evidence that 'allows a jury to infer intentional discrimination by the decisionmaker.'" *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004) (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). If a plaintiff relies on circumstantial evidence, the evidence "must directly point to a discriminatory reason for the employer's action[.]" *Whitfield v. Int'l Truck & Engine Corp.*, 755 F.3d 438, 444 (7th Cir. 2014) (citation omitted). Circumstantial evidence that can form a convincing mosaic falls into three categories: (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence that similarly situated employees outside the protected class received better treatment; and (3) evidence that the employer offered a pretextual reason for an adverse employment action. *Hutt*, 757 F.3d at 691 (citation omitted). "Each type of evidence is sufficient by itself (depending of course on its strength in relation to whatever other evidence is in the case) to support a

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2012) ("we have continued to apply the *McDonnell Douglas* burden-shifting framework in summary judgment cases that proceed under the indirect method of proof, a question *Gross* explicitly left open"); *Hnizdor v. Pyramid Mouldings, Inc.*, 413 F. App'x 915, 917-18 (7th Cir. Mar. 1, 2011); *Mach v. Will Cnty. Sheriff*, 580 F.3d 495, 498-99 (7th Cir. 2009) (applying the direct method of proof); *see also Yee v. UBS O'Connor, L.L.C.*, No. 07 C 7150, 2010 WL 1640192, at *17 (N.D. Ill. April 22, 2010) ("*Gross* did not equate the burden of proof in an ADEA case with the method of presenting that proof.").

judgment for the plaintiff; or they can be used together." *Troupe*, 20 F.3d at 736.

A plaintiff that has failed to establish discriminatory intent under the direct method may nonetheless prevail under the indirect method of proof—the burden-shifting approach first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 915 (7th Cir. 2007). Under the indirect method of proof, a plaintiff must first establish a *prima facie* case of discrimination, showing that: (1) she is a member of a protected class; (2) she was performing her job satisfactorily; (3) she suffered an adverse employment action; and (4) the defendant treated similarly situated employees outside of the protected class more favorably. *Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 841 (7th Cir. 2014). Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant "to articulate a legitimate, nondiscriminatory reason" for its actions. *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 979 (7th Cir. 2014) (citation omitted). If the defendant satisfies its burden, the burden returns to the plaintiff to show that the defendant's proffered reason is a pretext for discrimination. *Id.* (citation omitted).

The Seventh Circuit has found that the second and third categories of circumstantial evidence under the direct method (the similarly situated inquiry and pretext inquiry) are similar to the required elements under the indirect method, and thus the Court's "analyses overlap." *Coleman v. Donahoe*, 667 F.3d 835, 860 n.8 (7th Cir. 2012) (quoting *Egonmwan v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 845, 851 (7th Cir. 2010));

see also Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 490-91 (7th Cir. 2007) (explaining that the indirect method "involves a subset of circumstantial evidence (including the disparate treatment of similarly situated employees) that conforms to the prescription of [*McDonnell Douglas*]"); *Venturelli v. ARC Cmty. Servs., Inc.*, 350 F.3d 592, 601 (7th Cir. 2003) (explaining that the pretext category of circumstantial evidence under the direct method "is substantially the same as the evidence required under the indirect method" (internal quotation marks and citation omitted)). Ultimately, under either method, "the fundamental question at the summary judgment stage is simply whether a reasonable jury could find prohibited discrimination." *Bass*, 746 F.3d at 840; *see also Perez v. Thorntons, Inc.*, 731 F.3d 699, 703 (7th Cir. 2013).

Plaintiff seeks to avoid summary judgment on her discrimination claims via the direct method of proof by supplying circumstantial evidence. (R. 88, Pl.'s Mem. at 2-7.) Specifically, she argues that the facts give rise to an inference that Defendants' reasons for not promoting her are pretextual. (*Id.*) In order to successfully prove pretext, a plaintiff must put forth evidence demonstrating that "the employer's nondiscriminatory reason was dishonest" and that "the employer's true reason was based on a discriminatory intent." *Perez v. Illinois*, 488 F.3d 773, 777 (7th Cir. 2007) (citation omitted). A plaintiff "must show that the employer's reason is not credible or that the reason is factually baseless." *Id.*; *see also U.S. E.E.O.C. v. Target Corp.*, 460 F.3d 946, 960 (7th Cir. 2006) (a plaintiff can establish pretext "by presenting evidence that the employer's explanation was contrary to the facts, insufficient to justify the action or not truly the

employer's motivation" (citation omitted)). A plaintiff fails to demonstrate pretext if the evidence shows that "the employer honestly believed the reasons it has offered[.]" *Coleman*, 667 F.3d at 852 (citation omitted). "It is not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on its employee. Rather, the only question is whether the employer's proferred reason was pretextual, meaning that it was a lie." *Id.* (citation omitted); *see also Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 573 (7th Cir. 1998) (the court's "job is to determine whether the employer gave an honest explanation of its behavior[,]" and not to "sit as a super-personnel department that reexamines an entity's business decisions" (citation and internal quotation marks omitted)).

NHS provides three reasons for not selecting Plaintiff for the promotion to the Counselor position: (1) Plaintiff's pattern of tardiness; (2) her disrespectful communication style; and (3) her lower production numbers in comparison to Simmons'. (R. 96, NHS's Reply at 5.) The Court will address whether each of NHS's reasons is pretextual in turn.

A. Whether Plaintiff's tardiness is a pretextual reason for not promoting her

NHS's first reason for not promoting Plaintiff is that she was consistently tardy. (*Id.* at 5-7.) Evans first met with Plaintiff in December 2010 to address Plaintiff's attendance issues after Plaintiff had been tardy to work on several occasions. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 14.) In April 2011, Glenn and Anderson met with Plaintiff after she had been tardy seven times in two months and reiterated NHS's

expectations regarding attendance. (*Id.* ¶¶15-17.) Plaintiff was then tardy eight more times between April 2011 and October 2011. (*Id.* ¶18.) Consequently, Glenn met with Plaintiff again in October 2011 to remind Plaintiff of NHS's attendance policy and inform her that she would receive a written warning if her attendance issues continued. (*Id.* ¶¶ 19-20.)

Plaintiff admits that she had an attendance problem until April 2011, and admits that excluding the three days she was late with Glenn's prior approval, she was tardy five days between April 2011 and February 2012. (R. 88, Pl.'s Mem. at 3.) Even though Plaintiff characterizes her pattern of tardiness as "relatively minimal," she concedes that her tardiness alone would have been a sufficient reason for NHS to deny her the promotion. (*Id.*) Plaintiff offers no evidence to suggest that NHS's concerns over her attendance were factually baseless or dishonest. Instead, Plaintiff argues that the pretextual nature of NHS's additional proffered reasons undermines the legitimacy of its argument regarding her attendance. (*Id.*) However, to defeat summary judgment, Plaintiff must show that all of NHS's proffered reasons are pretextual. *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 754 (7th Cir. 2006) (where the defendant offers several nondiscriminatory reasons, the plaintiff must "establish that each of the defendants' reasons is pretextual" (citation omitted)); *Mills v. Health Care Servs. Corp.*, 171 F.3d 450, 459 (7th Cir. 1999) ("Because the defendant offered multiple reasons for its decision, [plaintiff] must show that all were pretextual in order to reverse . . . summary judgment." (citation omitted)). Plaintiff has offered no evidence from which a reasonable fact finder could conclude that NHS's

decision not to promote her based on her attendance issues was pretextual. Accordingly, the Court finds that Plaintiff has failed to establish her discrimination claims under either method of proof. Therefore, Plaintiff's claims fail as a matter of law. For the sake of completeness, however, the Court will analyze whether Plaintiff has demonstrated that NHS's other two reasons for not promoting her are pretextual.

B. Whether Plaintiff's disrespectful communication style is a pretextual reason for not promoting her

NHS's second reason for not promoting Plaintiff is its concern with her communication skills. (R. 96, NHS's Reply at 5.) NHS provides four examples of instances where it believes that Plaintiff exhibited a confrontational attitude. (*Id.* at 7-8.) The first instance occurred during a December 2010 meeting, in which Plaintiff told Glenn that she "really didn't want to hear any more about the action plan [the topic of the meeting] until they figured out how to really do it." (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 22.) The second instance occurred during a January 2011 meeting about their production goals, in which Plaintiff told Evans that she was not concerned about the production goals for the Counselors because the Intake Specialists' production numbers were good. (*Id.*) The third instance occurred during a February 2011 conversation between Plaintiff and Evans, in which they debated what to do with old client files. (*Id.*) The fourth instance occurred during a June 2011 conversation, in which Glenn denied Plaintiff her requested time off. (*Id.*)

Plaintiff does not dispute that all these instances occurred. (R. 88, Pl.'s Mem. at 3-5.) Rather, Plaintiff

disagrees with Defendants' characterization of her attitude in each of these instances as being disrespectful or confrontational. (*Id.*) As to the February 2011 instance in particular, Plaintiff argues that it was "a normal discussion between manager and employee over how something should be done" that got "blown up into a confrontation, perhaps because Evans realized she should not be deleting files." (*Id.* at 5.) However, the question is not whether Plaintiff's attitude was actually disrespectful or confrontational, but rather whether NHS honestly believed that she was disrespectful. *See Coleman*, 667 F.3d at 852; *Holshouser v. Abbott Labs.*, 31 F. Supp. 3d 964, 971-72 (N.D. Ill. 2014) ("It is well-settled in this Circuit and others that, where an employer honestly believes the reasons provided for a termination, a plaintiff cannot establish pretext, even if those reasons were wrongheaded in some manner."); *Strickert v. Wicker World Enters., Inc.*, No. 96 C 7955, 1998 WL 456546, at *7 (N.D. Ill. July 31, 1998) (key issue with regard to plaintiff's discrimination claim was "not simply whether [his] inappropriate behavior actually occurred, but whether [his employer] honestly believed that it occurred").

Plaintiff offers no evidence to demonstrate that Glenn and Evans did not honestly believe that Plaintiff was being disrespectful in these four instances. In fact, the evidence shows that Evans and Glenn did indeed think that Plaintiff acted inappropriately and communicated their concerns to Plaintiff. Immediately after the February 2011 incident, Evans and Plaintiff both met with Glenn, and Evans told Glenn that she believed that Plaintiff was challenging her authority. (R. 98, NHS's Rule 56.1 Resp. ¶ 11.) Plaintiff admits

that after this conversation, she understood that Evans believed that she had been insubordinate. (*Id.*) Glenn also met with Plaintiff in July 2011 to discuss all four instances. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 23.) At this meeting, Glenn informed Plaintiff that she did not feel that Plaintiff respected her as a supervisor and counseled Plaintiff on the need to improve her communication skills. (*Id.*) Glenn also warned Plaintiff of Ludwig's concern about her attitude. (*Id.* ¶ 24.) Glenn reiterated these concerns in Plaintiff's December 2011 performance review, reminding Plaintiff that she needed "to understand that attendance and being tactful in her communication is just as critical to her success as the other measures." (R. 98, NHS's Rule 56.1 Resp. ¶ 14.) Glenn and Evans therefore communicated to Plaintiff their concems regarding her attitude well before Plaintiff applied for the Counselor position in February 2012. Plaintiff has presented no evidence from which a reasonable trier of fact could infer that NHS did not honestly believe that Plaintiff's communication issues made her unqualified for the Counselor position. Accordingly, the Court finds that Plaintiff is unable to demonstrate that NHS's decision not to promote Plaintiff because of her attitude was a pretext for age or sex discrimination. *See David v. Donahoe*, No. 11 C 3720, 2013 WL 676243, at *9-*10 (N.D. Ill. Feb. 25, 2013) (finding that plaintiff failed to establish pretext because she provided no evidence that defendant did not honestly believe that she falsified employee time entries or that demoting her for that belief was inappropriate); *Alexander v. Cit Tech. Fin. Servs., Inc.*, 217 F. Supp. 2d 867, 890 (N.D. Ill. 2002) (finding that plaintiff failed to establish pretext because her "interpretations of incidents or her denials that they ever occurred do not address whether [her

employer] honestly believed that [she] was insubordinate and threatening").

C. Whether Simmons' superior performance as an Intake Specialist is a prextual reason for not promoting Plaintiff

NHS's third reason for not promoting Plaintiff is that it believed that Simmons was more qualified for the position based on his performance as an Intake Specialist. (R. 96, NHS's Reply at 11.) Simmons began working as an Intake Specialist at MHC in May 2011; his production numbers were recorded beginning September 2011. (R. 98, NHS's Rule 56.1 Resp. ¶ 16.) During the period of 2011 where both their production numbers were recorded, Simmons completed more files than Plaintiff in three of the four months. (*Id.*) Additionally, despite joining MHC in May, Simmons handled a total of 5,732 calls in 2011, whereas Plaintiff handled a total of 3,982 calls. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 34.)

Plaintiff argues that Defendants "cherry-picked production numbers in an effort to show that Simmons, during his relatively brief tenure, was better qualified." (R. 88, Pl.'s Mem. at 6.) Plaintiff asserts that she had the highest submission of completed files for the entire 2011 year, averaging 44 per month compared to Simmons' 41.75 per month. (*Id.*) However, as Fannie Mae points out, Plaintiff was the only Intake Specialist that worked the entire year. (R. 97, FM's Mem. at 4.) Comparing Plaintiff against Simmons for the period in 2011 that they both worked, Plaintiff averaged only 37 completed files per month against Simmons' 41.75. (*Id.*) Plaintiff also contends that Defendants' focus on phone

calls is "misplaced." (R. 88, Pl.'s Mem. at 7.) According to Plaintiff, from Simmons' initial hire in May 2011 through December 2011, he served half his time as an Administrative Assistant, answering incoming phone calls, and half his time as an Intake Specialist, reviewing documents and completing files for submission to Counselors. (R. 88, Pl.'s Mem. at 7.) Plaintiff asserts that this accounts for Simmons' high phone volume compared to herself and Hicks, who worked only as Intake Specialists and had limited receptionist responsibility. (*Id.*) However, Plaintiff provides no evidentiary support, other than her own affidavit, for the assertion that she and Simmons performed different duties. (R. 98, NHS' Rule 56.1 Resp. ¶ 18.)

Additionally, Plaintiff points to her December 2011 performance review to support her argument that she was qualified for the Counselor position. (R. 88, Pl.'s Mem. at 6.) In her review, Plaintiff received an overall Manager Appraisal Score of 3.9 out of a possible score of 5.0. (R. 98, NHS's Rule 56.1 Resp. ¶ 14.) For the Core Factors of Achievement, Productivity/Time Management, and Accountability she received an Exceeds Performance Measure. (*Id.*) As to the Achievement factor, Glenn noted that Plaintiff "has played an [sic] significant role in our production relating to the number of files complete[d]" and that she "managed our intake files independently for the months of January and February." (*Id.*) Glenn also noted that from January 2011 to June 2011, Plaintiff's average number of completed files "exceeded her peers." (*Id.*)

Plaintiff argues that NHS's decision to promote Simmons based in part on his performance must be a lie because the evidence demonstrates that she was just as qualified for the position. (R. 88, Pl.'s Mem. at 7.) However, Plaintiff cannot establish pretext by simply arguing that NHS was mistaken about its assessment of her performance relative to Simmons' performance, or that NHS's decision was wrong. *See Coleman*, 667 F.3d at 852; *Green v. Nat'l Steel Corp., Midwest Div.*, 197 F.3d 894, 900 (7th Cir. 1999) ("It is 'a distraction' for [plaintiff] to argue about the accuracy of [defendant's] assessment of her involvement in the alleged behavior because that is not the determinative issue."). The Court "does not sit as a super personnel department to review an employer's business decisions." *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000). Plaintiff must prove that NHS's proffered reason "was a lie, and not merely a mistake," *id.*, and Plaintiff has failed to meet her burden. She has offered no evidence to refute NHS's contention that Glenn and Coffey honestly believed after reviewing the production numbers that Simmons was more qualified for the position based on his performance. *See id.* ("[Plaintiff's] attack on the way [his employer] calculated his sales figures gets him nowhere as long as the company's reliance on those calculations was in good faith."). Therefore, Plaintiff has failed to provide sufficient evidence from which a reasonable fact finder can infer that NHS's decision to promote Simmons based on his performance was pretextual.

Accordingly, Plaintiff cannot establish that any of NHS's proffered reasons for not promoting her are pretext for age or sex discrimination. Plaintiff has thus

failed to prove her claims under either the direct or indirect method. The Court therefore concludes that Plaintiff's discrimination claims fail as a matter of law, and that Defendants are entitled to summary judgment on these claims.

II. Plaintiff's Retaliation Claims (Counts III and IV)

In Counts III and IV, Plaintiff alleges that Defendants retaliated against her in violation of the ADEA and Title VII for filing an internal complaint of discrimination with NHS's human resources department. (R. 46, Am. Compl. ¶¶ 66-70, 72-75.) As with discrimination claims, a plaintiff may establish retaliation claims by way of either the direct or indirect method. *Smith v. Lafayette Bank & Trust Co.*, 674 F.3d 655, 657 (7th Cir. 2012) (citation omitted); *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 740 (7th Cir. 2011).[5] Here, Plaintiff seeks to prove her retaliation claims by way of the direct method. (R. 88, Pl.'s Mem. at 7.) To prevail using this method, Plaintiff must present evidence, direct or circumstantial, showing that: (1) she engaged in a statutorily protected activity; (2) she was subjected to an adverse employment action; and (3) a causal connection exists between the two. *Greengrass v. Int'l Monetary Sys.*

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[5] The analysis for retaliation claims is the same under the ADEA and Title VII. *See Smith*, 674 F.3d at 657; *Silverman*, 637 F.3d at 740. The Court thus cites relevant case law interchangeably.

Ltd., 776 F.3d 481, 485 (7th Cir. 2015) (citation omitted).[6]

The parties do not dispute that Plaintiff engaged in a protected activity when she filed an internal complaint with Anderson on February 27, 2012. (R. 82, NHS's Mem. at 13; R. 88, Pl.'s Mem. at 8.) As to the second element, Plaintiff alleges that she suffered two adverse employment actions in retaliation for filing her internal complaint: (1) Defendants removed her from her position at MHC on March 6, 2012; and (2) NHS constructively discharged her. (R. 88, Pl.'s Mem. at 8, 14-15.) NHS concedes that Plaintiff's removal from her position at MHC was an adverse employment action. (R. 96, NHS's Reply at 15.) However, NHS disputes that Plaintiff was constructively discharged. (*Id.*) NHS argues that Plaintiff voluntarily resigned and that her voluntary resignation does not constitute an adverse employment action "separate and apart from NHS' decision to remove her from the MHC." (*Id.*)

"The term 'constructive discharge' refers to the situation in which an employer, without firing an employee, makes his working conditions so miserable that it drives him to quit." *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 655 (7th Cir. 2000). To prove constructive discharge, a plaintiff must show that her

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[6] To establish a *prima facie* case of retaliation under the indirect method, Plaintiff must satisfy the first two elements of the direct method and further show that: (1) she was meeting the employer's legitimate expectations; and (2) she was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity. *Ripberger v. Corizon, Inc.*, 773 F.3d 871, 883 (7th Cir. 2014). Plaintiff does not offer any evidence to prove retaliation via the indirect method.

"working conditions were so intolerable as a result of unlawful discrimination that a reasonable person would be forced into involuntary resignation." *Tutman v. WBBM-TV, Inc. / CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir. 2000). "Working conditions for constructive discharge must be even more egregious than the high standard for hostile work environment[.]" *Id.* "[U]nless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997).

Plaintiff argues that she was constructively discharged because the administrative position NHS offered her would have resulted in a 25 percent pay reduction that she could not afford and represented a "lack of further career advancement." (R. 88, Pl.'s Mem. at 15.) Plaintiff contends that her situation is similar to that of the plaintiff in *Hunt*. (*Id.*) In that case, a white male police officer claimed that he was constructively discharged because he was forced to resign after being told by the predominantly black municipal administration that he had no future in the police department. *Hunt*, 219 F.3d at 652. The Seventh Circuit reversed the district court's grant of summary judgment on this claim, holding that "[a] person who is told repeatedly that he is not wanted, has no future, and can't count on ever getting another raise would not be acting unreasonably if he decided that to remain with this employer would necessarily be inconsistent with even a minimal sense of self-respect, and therefore intolerable." *Id.* at 655. The Court finds the present case distinguishable from *Hunt*. Unlike the police officer in *Hunt*, Plaintiff was never told that she had no future at NHS. Plaintiff has presented no

evidence to suggest that if she accepted the available administrative position, she would not subsequently have the opportunity to move into a different, higher paying position at NHS. While the Court recognizes that accepting the administrative position was not preferable to Plaintiff because of the reduction in pay and the increased travel expenses, her situation does not rise to the level of being intolerable. *See Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873, 877 (7th Cir. 1999) (providing examples of intolerable working conditions, such as "a work environment where a subordinate's disputed sexual relationship with her supervisor led to a suicide attempt"). The Court therefore finds that Plaintiff has not proven that she was constructively discharged. Plaintiff understood that by declining NHS's offer of the administrative position, she was voluntarily resigning her employment with NHS. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 77.) "In the absence of circumstances suggesting a constructive discharge, an employee who voluntarily resigns cannot be said to have experienced an adverse employment action." *Andrews v. CBOCS W., Inc.*, 743 F.3d 230, 235 (7th Cir. 2014). Accordingly, the Court finds that the only adverse employment action Plaintiff suffered was her removal from MHC.

To satisfy the third element of the direct method, Plaintiff must show that there was a causal link between her internal complaint and her removal from MHC. *See Greengrass*, 776 F.3d at 485. To establish a causal link, a plaintiff must establish that her internal complaint was the "but-for cause" of an adverse employment action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013); *see also Greengrass*, 776 F.3d at 486 ("To demonstrate 'causal

link' between the protected activity and the adverse employment action, a plaintiff must show the defendant would not have taken the adverse action but for her protected activity." (citation and internal alterations and quotation marks omitted)). In other words, to survive summary judgment, a plaintiff needs to provide enough direct or circumstantial evidence to allow a jury to conclude that she suffered an adverse employment action because of her statutorily protected activity. *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 643 (7th Cir. 2013); *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709 (7th Cir. 2011).

As an initial matter, Defendants argue that Plaintiff cannot prove a causal connection because there is no evidence that the individuals who made the decision to remove Plaintiff from MHC—Coffey and Glenn—had knowledge of her internal discrimination complaint at the time of that decision. (R. 96, NHS's Reply at 12-14; R. 97, FM's Reply at 6-7.) Plaintiff argues that there are fact questions as to whether Anderson informed others at NHS and Fannie Mae about Plaintiff's discrimination complaint. (R. 88, Pl.'s Mem. at 10-13.) Plaintiff contends that Anderson took notes during their meeting on February 27, 2012, and that Anderson later told Plaintiff that she created a file on her subsequent investigation of Plaintiff's discrimination complaint. (*Id.* at 11) Anderson explained to Plaintiff that she left this file in her office when her employment with NHS was terminated. (*Id.*) According to Plaintiff, this file would have confirmed whether Anderson informed anyone at NHS or Fannie Mae of Plaintiff's complaint during the course of investigating that complaint. (*Id.*) However, NHS failed to produce Anderson's notes and investigation file in

response to Plaintiff's discovery requests. (*Id.*) Plaintiff thus argues that "the missing notes and file creates an adverse inference and a fact question" as to Defendants' claimed ignorance of the discrimination complaint. (*Id.*) NHS counters that after conducting an exhaustive search, it produced all documents responsive to Plaintiff's discovery requests. (R. 98, NHS's Rule 56.1. Resp. ¶ 28.) NHS also correctly asserts that Plaintiff's testimony that Anderson told her that she created a file regarding her complaint is inadmissible hearsay. (R. 96, NHS's Reply at 13.) *See Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) ("hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial" (citation omitted)).

Even if the Court assumes that Anderson created a file, Plaintiff has provided no evidence that the file would include proof that Anderson informed Glenn, Coffey, or Green of Plaintiff's complaint. Plaintiff testified that she never complained about discrimination to any supervisor or manager at NHS aside from Anderson, and that she had no personal knowledge that Anderson actually informed anyone about her complaint. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶¶ 58-59.) Anderson attests in her affidavit that she never informed Glenn, Coffey, or any other employee of NHS or Fannie Mae that Plaintiff had alleged that the promotion decision was discriminatory, or that Plaintiff had an appointment with the EEOC. (R. 83-5, Ex. D, Anderson Aff. ¶¶ 6-7.) Additionally, Glenn, Coffey, and Green all attest in their affidavits that they were not informed by anyone at any time during Plaintiff's employment that she had complained of discrimination and made an EEOC appointment.

(83-1, Ex. A, Coffey Aff. ¶ 13; R. 83-4, Ex. C, Glenn Aff. ¶¶ 15-16; R. 83-6, Ex. E, Green Aff. ¶ 12.) Plaintiff has not refuted this testimony with any evidence. Thus, Plaintiff's argument that Glenn and Coffey must have known about Plaintiff's internal complaint is based solely on speculation. While the Court construes the facts in favor of the nonmoving party on summary judgement, that favor "does not extend to drawing inferences that are supported by only speculation or conjecture." *Harper v. C.R. England, Inc.*, 687 F.3d 297, 306 (7th Cir. 2012) (citation and internal alterations and quotation marks omitted). The Court therefore finds that Plaintiff has not provided sufficient evidence to create a genuine factual dispute as to Coffey's and Glenn's ignorance of Plaintiff's internal complaint. *See Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1108 (7th Cir. 2012) (affirming grant of summary judgment on plaintiffs' retaliation claim because "plaintiffs' argument for retaliatory animus relie[d] entirely on speculation" and "[n]o affirmative evidence suggest[ed] that the decision-makers were even *aware* of the plaintiffs' discrimination complaints before they denied the transfers, much less that they did so intending to retaliate against the plaintiffs"); *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1121-22 (7th Cir. 2009) (finding that plaintiff's retaliation claim failed because he presented no evidence that his supervisor was aware of his EEOC charges at the time of his suspension and thus he could not establish a causal link).

Regardless, even if the Court assumes that Coffey and Glenn knew about Plaintiff's internal complaint, Plaintiff must still prove that they removed her from her position at MHC because she filed the internal

complaint. *See Hobgood*, 731 F.3d at 643; *Brown*, 700 F.3d at 1108 ("the plaintiffs must produce evidence that a retaliatory motive *actually* influenced the decision-maker, not merely that it *could* have"). Plaintiff attempts to establish this casual connection by providing circumstantial evidence of suspicious timing and pretext. (R. 88, Pl.'s Mem. at 7-10.) First, Plaintiff argues that because her removal from MHC came just eight days after she filed her internal complaint, the Court should infer a causal link between the two events. (R. 88, Pl.'s Mem. at 8.) "[T]emporal proximity between an employee's protected activity and an adverse employment action is rarely sufficient to show that the former caused the latter." *Coleman*, 667 F.3d at 860 (citation omitted). "When temporal proximity is one among several tiles in an evidentiary mosaic depicting retaliatory motive, however, suspicious timing can sometimes raise an inference of a causal connection." *Id.* (citation and internal alterations and quotation marks omitted); *see also Lang v. Ill. Dep't of Children and Family Servs.*, 361 F.3d 416, 419 (7th Cir. 2004) ("Close temporal proximity provides evidence of causation and may permit a plaintiff to survive summary judgment provided that there is also other evidence that supports the inference of a causal link." (internal citation omitted)).

Plaintiff also argues that there is evidence that NHS's purported reason for her removal is pretextual. (R. 88, Pl.'s Mem. at 8.) According to Plaintiff Coffey and Glenn removed her from MHC because of her February 7, 2012 e-mail to Ludwig. (*Id.*) Plaintiff contends that this purported reason is pretextual because she was never reprimanded for sending the e-mail and her Career Progression Plan did not include

the e-mail as a specific example of improper communication. (*Id.* at 8-9.) In Plaintiff's opinion, the e-mail was "a minor issue," and Coffey only "developed a renewed interest" in the e-mail after NHS had already decided to remove her from MHC. (*Id.* at 9-10.)

Plaintiff incorrectly assumes that NHS's purported reason for her removal from MHC was her e-mail to Ludwig. Both Coffey and Glenn attest in their affidavits that they removed Plaintiff because of concerns regarding her performance and attitude that were raised by Green, Glenn, and other Fannie Mae personnel. (R. 83-1, Ex. A, Coffey Aff. ¶ 10; R. 83-4, Ex. C, Glenn Aff. ¶ 12.) They include Plaintiff's e-mail as one specific example for why they were concerned about Plaintiff's attitude, but they do not state that her e-mail was the sole basis for their decision. (R. 83-1, Ex. A, Coffey Aff. ¶ 10; R. 83-4, Ex. C, Glenn Aff. ¶ 12.) As explained above, Plaintiff has provided no evidence to suggest that Coffey and Glenn did not honestly believe that Plaintiff had communication issues. Nor has Plaintiff provided evidence that Coffey and Glenn did not honestly believe that Plaintiff's performance and attitude necessitated her removal from MHC. Further, while Plaintiff may believe that her e-mail to Ludwig was only "a minor issue," the evidence shows that Glenn was concerned about the e-mail. Glenn attests that she was concerned about the e-mail because she had specifically directed Plaintiff to bring any issues she had regarding Fannie Mae processes or procedures directly to her, rather than to raise them with Fannie Mae personnel. (R. 83-4, Ex. C, Glenn Aff. ¶ 10.) Glenn also attests that she discussed with Plaintiff why she believed the e-mail was inappropriate at their February 8, 2012 meeting. (*Id.* ¶ 11.) Plaintiff

admitted in her deposition that during that meeting, Glenn appeared to be "unhappy" about the e-mail. (R. 91, Pl.'s Rule 56.1 Resp. to NHS ¶ 48.)

Finally, the fact that Plaintiff's Career Progression Plan did not mention the e-mail is of no consequence. Glenn submitted the final draft of Plaintiff's Career Progression Plan to Anderson on the same day Plaintiff filed her internal complaint. (R. 98, NHS's Rule 56.1 Resp. ¶ 22.) The Career Progression Plan outlined Plaintiff's current status regarding her areas for improvement in attendance and communication. (R. 89-4, Ex. 4, Finalized Career Progression Plan at 2-4.) The Plan noted that Plaintiff struggled with her communication skills, providing her June 2011 encounter with Glenn regarding her requested time off as one example. (*Id.* at 3.) The Plan recommended that Plaintiff focus on "conflict management" and on approaching others "in a tactful manner." (*Id.* at 4.) The Plan thus further confirms that Glenn was concerned about Plaintiff's attitude before Plaintiff filed her internal complaint. The Court therefore cannot find that the Plan is evidence that Glenn's and Coffey's decision to remove her from MHC based on her attitude is pretextual.

Accordingly, Plaintiff has not provided sufficient circumstantial evidence to allow a reasonable jury to conclude that NHS removed her from her position at MHC because she filed an internal complaint. Because Plaintiff has not established the causation requirement, her retaliation claims fail as a matter of

law. Therefore, the Court finds that Defendants are entitled to summary judgment on these claims.[7]

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (R. 80; R. 84) are GRANTED. The Clerk of the Court is directed to enter a final judgment in favor of Defendants Neighborhood Housing Services of Chicago and Fannie Mae.

ENTERED: **/s/ Rubén Castillo**
Chief Judge Rubén Castillo
United States District Court

Dated: September 10, 2015

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[7] Fannie Mae also argues that it had no involvement in NHS's decision to select Simmons for the Counselor position or NHS's decision to remove Plaintiff from MHC, and thus it cannot be held liable under the ADEA or Title VII. (R. 86, FM's Mem. at 10, 13-14) Because the Court has found that Plaintiff failed to establish her discrimination and retaliation claims, the Court need not address the extent of Fannie Mae's liability.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 12 C 10150
Judge Ruben Castillo

[Filed September 10, 2015,
Entered September 14, 2015]

Charmaine Hamer,
Plaintiff(s),

v.

Neighborhood Housing Services of Chicago
Defendants(s).

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐includes pre-judgment interest.
☐ does not include pre-judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) Neighborhood Housing Services of Chicago and Fannie Mae and against plaintiff(s) Charmaine Hamer

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Ruben Castillo on a motion for summary judgment

Thomas G. Bruton. Clerk of Court
/s/ Ruth O'Shea
Ruth O'Shea, Deputy Clerk

Date: 9/10/2015

APPENDIX C

28 U.S.C. § 2107

§ 2107. Time for appeal to court of appeals

Effective: December 1, 2011

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

Fed. R. App. P. 4

Appeal as of Right--When Taken

[Text of subdivision (a) effective until December 1, 2016, absent contrary Congressional action.]

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district

clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise

prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when

the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after

the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

NO: 12 C 10150
Judge Ruben Castillo

[Filed October 8, 2015]

CHARMAINE HAMER,
Plaintiff,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO and FANNIE MAE,
Defendants.

MOTION TO WITHDRAW AND TO EXTEND DEADLINE FOR FILING NOTICE OF APPEAL

Kevin James Caplis, of QUERREY & HARROW, LTD., appointed counsel for the Plaintiff, Charmaine Hamer, together with Thomas P. Carney, Jr. and Jason Callicoat, his co-counsel herein, move this court pursuant to Local Rule 83.17 for leave to withdraw as counsel for Plaintiff, and to extend the deadline for filing a Notice of Appeal pursuant to 28 USC 2107(c), and in support, states as follows:

1. Movant Kevin James Caplis of Querrey & Harrow, Ltd. was appointed by this Court's Order of

May 28, 2014 to represent Plaintiff herein. Movants Thomas P. Carney, Jr. and Jason Callicoat entered appearances as his co-counsel.

2. Movants seek leave to withdraw as counsel for Charmaine Hamer because they disagree as to how to proceed regarding the filing of an appeal in the above captioned matter, making further representation impossible.

2. Judgment was entered in this matter on September 14, 2015, such that any Notice of Appeal must be filed on or before October 14, 2015.

3. Movants request that this court extend the deadline to file any Notice of Appeal to December 14, 2015, pursuant to 28 USC 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued.

4. Movants informed Charmaine Hamer of this motion via email correspondence on October 6, 2015. When filed, a copy of this motion will also be sent to Charmaine Hamer at her residence address, via certified mail, return receipt requested.

WHEREFORE, Kevin James Caplis, Thomas P. Carney, Jr. and Jason Callicoat, of Querrey & Harrow, Ltd., request this Court enter an order granting them leave to withdraw their appearances on behalf of Plaintiff Charmaine Hamer, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,
Kevin James Caplis, Thomas P. Carney, Jr. Jason Callicoat
Querrey & Harrow, Ltd.

By: /s/Kevin James Caplis
Kevin James Caplis
Querrey & Harrow, Ltd.
175 W. Jackson Blvd., Ste. 1600
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312-540-7000
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Kevin Caplis
Thomas P. Carney, Jr.
Jason Callicoat
QUERREY & HARROW, LTD.
Attorneys for Plaintiff
175 West Jackson Boulevard, #1600
Chicago, Illinois 60604
(312) 540-7000

[*Proof of Service Omitted in Printing of this Appendix.*]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No: 12 C 10150
Chief Judge Ruben Castillo

[Filed October 8, 2015]

Charmaine Hamer	)
	)
v.	)
	)
Neighborhood Housing Services of Chicago and Fannie Mae,	)
	)

ORDER

Plaintiff's motion to withdraw and to extend deadline for filing notice of appeal [103] is granted. The motion hearing set for 10/14/2015 is stricken. Kevin James Caplis, Thomas P. Carney, Jr., and Jason Callicoat of Querrey & Harrow, Ltd. are granted leave to withdraw their appearances on behalf of the plaintiff. The Court will give Plaintiff until December 14, 2015 to file a Notice of Appeal.

Date: October 8, 2015

/s/ Chief Judge Ruben Castillo

APPENDIX F

IN THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No: 12 CV 10150
Judge Ruben Castillo

[Filed December 11, 2015]

CHARMAINE HAMER,
Plaintiff

v.

NEIGHBORHOOD HOUSING SERVICES
OF CHICAGO & FANNIE MAE,
Defendant

Notice of Appeal

Notice is hereby given that (Plaintiff/Defendant) in the above captioned case, appeals to the United States Court of Appeals for the Seventh Circuit from the District Court's entry of judgment in favor of (Plaintiff/Defendant) on (Date).

Signature Charmaine Hamer
Name Charmaine Hamer
Address 9546 S. FOREST AVE, CHICAGO IL
Phone number 273-468-2943

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 15-3764

[Filed December 30, 2015]

CHARMAINE HAMER, Plaintiff-Appellant,	)
v.	)
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et al. Defendants-Appellees.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 12-cv-10150

The Honorable Judge Ruben Castillo

APPELLEES NEIGHBORHOOD HOUSING SERVICES OF CHICAGO AND FANNIE MAE'S JOINT CORRECTED DOCKETING STATEMENT

Defendants-Appellees Neighborhood Housing Services of Chicago ("NHS") and Fannie Mae, formally known as the Federal National Mortgage Association ("Fannie Mae"), by their counsel, hereby submit their

Joint Corrected Docketing Statement pursuant to Seventh Circuit Court Rules 3(c)(1) and 28(a).

1. District Court Jurisdiction

Plaintiff-Appellant, Charmaine Hamer, brought this action for damages against Defendant-Appellees NHS and Fannie Mae alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., as amended. The district court had jurisdiction over the claims pursuant to 28 U.S.C. § 1331. Defendant-Appellee NHS is a not-for-profit organization incorporated in Illinois, with its principal place of business in Illinois. Defendant-Appellee Fannie Mae is a federally-chartered, shareholder-owned, private corporation incorporated in Delaware, with its principal place of business in the District of Columbia.

2. Appellate Court Jurisdiction

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, in that on December 11, 2015, Plaintiff-Appellant filed a timely Notice of Appeal from a final judgment of the United States District Court for the Northern District of Illinois that disposed of all of Plaintiff-Appellant's claims against the Defendants-Appellees.

3. The Date of Entry of the Judgment Sought to be Reviewed

i. On September 10, 2015, the district court entered an order granting summary judgment to Defendants-Appellees and disposing of all Plaintiff-Appellant's claims against the Defendants-Appellees.

R. 100, 101. On September 10, 2015, the district court also entered final judgment against Plaintiff-Appellant. R. 102.

ii. No motion for a new trial or alteration of the judgment was filed. However, on October 8, 2015, appointed counsel for Plaintiff-Appellee filed a motion for leave to withdraw as counsel and to extend the deadline for Plaintiff-Appellee to file a Notice of Appeal pursuant to 28 U.S.C. § 2107(c). R. 103.

iii. On October 8, 2015, the district court entered an order granting Plaintiff-Appellee's motion, granting appointed counsel for Plaintiff-Appellee leave to withdraw their appearances, and extending the deadline for Plaintiff-Appellee to file a Notice of Appeal to December 14, 2015. R. 105.

iv. On December 11, 2015, Plaintiff-Appellant timely filed a Notice of Appeal, as well as a motion for permission to appeal in forma pauperis. R. 106, 107. The district court granted Plaintiff-Appellant's motion for permission to appeal in forma pauperis on December 15, 2015. R. 111.

v. This case is not a direct appeal from the decision of a magistrate judge.

Respectfully submitted,

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO,

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Respectfully submitted,

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Dated: December 30, 2015

[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX H

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 15-3764

[Filed December 31, 2015]

CHARMAINE HAMER,
Plaintiff-Appellant,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, and FANNIE MAE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:12-cv-10150

Ruben Castillo, Chief Judge.

December 31, 2015

By the Court:

ORDER

On consideration of "APPELLEES NEIGHBORHOOD HOUSING SERVICES OF CHICAGO AND FANNIE MAE'S JOINT CORRECTED DOCKETING STATEMENT" filed on December 30, 2015,

IT IS ORDERED that appellees file, on or before January 8, 2016, a brief memorandum, addressing the timeliness of this appeal.

Specifically, Fed. R. App. P. 4(a)(5)(C) states that no extension of time to appeal "may exceed 30 days after the prescribed time [to appeal]." In this case, the time to appeal expired on October 14, 2015, permitting the district court to extend the time to appeal until November 13, 2015, but no later. As such, it appears that the district court lacked the authority to extend the time to appeal beyond November 13, 2015.

APPENDIX I

No. 15-3764

In the United States Court of Appeals for the Seventh Circuit

[Filed January 8, 2016]

CHARMAINE HAMER,
PLAINTIFF-APPELLANT,
v.
NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, THE HONORABLE JUDGE RUBEN CASTILLO CASE NO. 12-CV-10150

APPELLEES' MEMORANDUM ADDRESSING TIMELINESS OF APPEAL

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[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

Appellees, Neighborhood Housing Services of Chicago and Fannie Mae, by and through their undersigned respective counsel of record, and pursuant to this Court's December 31, 2015 Order, hereby submit this Memorandum Addressing Timeliness of Appeal in the above-captioned appeal. Until receipt of this Court's December 31, 2015 Order, Appellees had not been aware of the potential timeliness issue created by the district court's October 8, 2015 Order (and appellant's subsequent apparent reliance upon that Order), which granted appellant Charmaine Hamer until December 14, 2015 to file a Notice of Appeal in apparent violation of Fed. R. App. P. 4(a)(5)(C). Upon receipt of this Court's December 31 Order, Appellees have subsequently reviewed the issue raised by this Court and present their findings here.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The underlying action concerns Hamer's allegations of sex and age discrimination under the federal employment discrimination laws. Hamer filed her original complaint, *pro se*, on December 19, 2012. (Dkt. 1.) The district court subsequently granted Hamer's motion for appointment of counsel. (Dkt. 6.) Plaintiff had a total of four different law firms appointed to represent her at various stages of the district court litigation. (Dkts. 6, 35, 68.)

Following the close of discovery, appellees filed separate motions for summary judgment on February 25, 2015. (Dkts. 80, 84.) Hamer opposed the motions. (Dkt. 88.) On September 14, 2015, the district court granted summary judgment in appellees' favor. (Dkt. 102.) Thus, pursuant to Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, Hamer's original deadline to file her Notice of Appeal was October 14, 2015.

On October 8, 2015, Hamer's court-appointed counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal." (Dkt. 103.) The motion requested that the district court "extend the deadline to file any Notice of Appeal to December 14, 2015, pursuant to 28 USC 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." (*Id.*) The district court granted the motion that day. The Order granting the motion, which was entered October 9, 2015, stated, *inter alia*, "The Court will give Plaintiff until December 14, 2015 to file a Notice of Appeal." (Dkt. 105.) Pursuant to 28 U.S.C. § 2107(c)

and Fed. R. App. P. 4(a)(5), the district court was permitted to grant Hamer an extension of time to file the Notice of Appeal; however, as this Court noted in its December 31, 2015 Order, in light of Fed. R. App. P. 4(a)(5)(C), the district court lacked the authority to extend the time to appeal beyond November 13, 2015.

Nevertheless, and apparently in reliance upon the district court's October 9 Order, Hamer filed her Notice of Appeal on December 11, 2015, within the timeframe permitted by the district court's Order, but outside the timeframe allowed by Fed. R. App. P. 4(a)(5)(C).

On December 31, 2015, this Court entered an Order, instructing appellees to file a brief addressing the timeliness of this appeal. This was the first time that Appellees became aware of the potential timeliness issue created by the district court's October 9 Order.

DISCUSSION

A. The Issue of the Timeliness of Hamer's Appeal Does Not Appear to Be Jurisdictional[1] According to the Law of this Circuit.

In *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984), this Court described as a "judge-made rule, especially well established in this circuit," that "if

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[1] Appellees here use the term "jurisdictional" in the strict sense of the word. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (lamenting that the word "jurisdiction" has been used to convey "many, too many, meanings," and cautioning litigants to limit its use to describe requirements that "can never be forfeited or waived").

before the time for filing the notice of appeal has expired the district judge grants an extension of time for filing the notice beyond the limits set in Rule 4(a)(5), and the appellant relies on the extension, the notice of appeal is timely if filed within the extended time." *Id.* at 182–83 (citing *Textor v. Bd. of Regents*, 711 F.2d 1387, 1390–91 (7th Cir. 1983)). In *Bernstein*, the appellant had filed a motion for extension of time to file the Notice of Appeal in the district court shortly after entry of the appealable order. *Id.* at 182. In granting the motion, the district court erroneously extended the deadline to file the Notice of Appeal to relate to the district court's later ruling on a Rule 60(b) motion, which did not occur until months later, resulting in a violation of Rule 4(a)(5). *Id.* In ruling that the appeal could proceed, the Court noted:

> We interpret the district judge's order . . . as intended to set a new filing deadline of 30 days after the judge acted on the motion for reconsideration under Rule 60(b); and while this deadline was way past the longest extension that the judge was authorized to give Bernstein, under our rule the appeal, which was filed before the new deadline, was timely.

Id. at 183.

Bernstein and its brethren were, if not overruled, at least largely abrogated by the Supreme Court in *Bowles v. Russell*, 551 U.S. 205 (2007).[2] In *Bowles*, the

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[2] Appellees have located no Seventh Circuit decision since *Bowles* citing to *Bernstein* on the issues presented in this brief. Further, *Bernstein* relied upon *Textor v. Board of Regents*, 711 F.2d 1387 (7th Cir. 1983), which in turn relied on the "narrow exception" it

issue presented was "whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order." *Id.* at 206. There, following entry of final judgment and the expiration of the ordinary 30-day deadline to file a notice of appeal, Bowles moved the district court to reopen the period during which he could file his notice of appeal pursuant to Fed. R. App. P. 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. *Id.* at 207. The district court granted Bowles' motion, but rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the district court "inexplicably" gave Bowles 17 days to file his notice of appeal. *Id.* Bowles filed his notice of appeal within the 17 days allowed by the district court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). *Id.* The Supreme Court held that Bowles's untimely notice of appeal—though filed in reliance upon the district court's order—deprived the appellate court of jurisdiction. *Id.* at 209–13.

Central to the Court's holding that the deadline was jurisdictional, however, was the fact that it had a statutory basis:

> Like the initial 30–day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute,

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found in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam). As discussed, *infra*, at Section C, the exception found in *Thompson* was, if not entirely, at least largely overruled in *Bowles*.

> 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations.

Id. at 213 (internal citations omitted).

In the instant appeal, as in *Bowles*, the district court entered an order granting appellant a longer extension of her deadline to file her notice of appeal than was allowed by 4(a). And, here, as in *Bowles*, appellant filed her notice of appeal within the timeframe allowed by the district court's order, but outside the deadline set forth in 4(a). However, and perhaps critically, here, unlike in *Bowles*, the underlying deadline at issue does not appear to derive from a statute. Rather, 28 U.S.C. § 2107(c), merely requires that a motion to extend the time for appeal be filed "not later than 30 days after the expiration of the time otherwise set for bringing appeal." That requirement was satisfied here, when Hamer's counsel filed the motion for extension of time on October 8, 2015. The requirement of Fed. R. App. P. 4(a)(5)(C)—

that "[n]o extension . . . may exceed 30 days after the prescribed time"—does not appear in 28 U.S.C. § 2107(c); rather it appears to be purely a creature of the Federal Rules of Appellate Procedure.[3] The deadlines contained in Rule 4(a)(5)(C) are thus likely not jurisdictional under the reasoning of *Bowles*.[4]

Consistent with this reasoning, the Seventh Circuit has repeatedly held, since *Bowles*, that while appellate deadline requirements derived from statute (*e.g.*, 28 U.S.C. § 2107(c)) are jurisdictional, those that are purely a creation of the federal rules are not. For example:

• In *Asher v. Baxter International Inc.*, 505 F.3d 736 (7th Cir. 2007), this Court noted that *Bowles* "holds that statutory deadlines for appeal are jurisdictional, but read in conjunction with decisions such as *Eberhart v. United States*, 546 U.S. 12 (2005), holds out the possibility that deadlines in the federal rules are just claim-processing norms." *Id.* at 741.

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[3] In *Youkelsone v. FDIC*, 660 F.3d 473 (D.C. Cir. 2011), the D.C. Circuit commented that "Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code." *Id.* at 475.

[4] Wright and Miller, on the question of whether Rule 4(a)(5)'s 30-day and 10-day deadlines are jurisdictional within the meaning of *Bowles*, note that "[t]here is a plausible argument that they are not: Bowles relied heavily on the fact that Rule 4(a)(6)'s 14-day limit was also set by statute, and (interestingly) Section 2107 does not contain the 30-day and 14-day limits set by Rule 4(a)(5)(C)." 16A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Catherine T. Struve, Fed. Prac. & Proc. Juris. § 3950.3 (4th ed. 2008) (citing *Youkelsone*, 660 F.3d at 475–76).

• In *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013), this Court was more definitive regarding the statutory/non-statutory dichotomy, noting, "Statutory time limits for appeal can be jurisdictional, [citing *Bowles*], but time limits in the Rules of Appellate Procedure are not." *Id.* at 746.

• In *United States v. Neff*, 598 F.3d 320 (7th Cir. 2010), this Court applied the statutory/non-statutory dichotomy, finding that because Fed. R. App. P. 4(b)—prescribing the deadline to file a notice of appeal in a criminal case—did not have a statutory basis—it was not jurisdictional and was merely a claim-processing rule that could be forfeited. *Id.* at 323.

• In *1756 W. Lake Street LLC v. American Chartered Bank*, the issue was whether the notice of appeal satisfied the notice requirements of Fed. R. App. P. 3(c)(1)(A). 787 F.3d 383, 385 (7th Cir. 2015). In holding that it was, this Court cited *Bowles* in *dicta* for the proposition that "deadlines established by the federal rules, as distinct from deadlines established by statutes (such as 28 U.S.C. § 2107(c)), are not jurisdictional." *Id.*[5]

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[5] The closest authority factually, since *Bowles*, that Appellees have been able to locate is outside this Circuit, but is consistent with the statutory/non-statutory dichotomy applied in this Circuit. In *Youkelsone v. FDIC*, 660 F.3d 473 (D.C. Cir. 2011), the appellant sought an extension of time with the district court to file her notice of appeal, and, as here, the district court errantly extended the deadline past the limit set forth in Rule 4(a)(5)(C). *Id.* at 475. As here, the appellant then filed her Notice of Appeal in conformity

Thus, although Appellees have been able to locate no Seventh Circuit decision since *Bowles* squarely addressing the precise factual scenario at issue here, it appears to be the law in this Circuit that the time limits found Fed. R. App. P. 4(a)(5)(C) are not jurisdictional because they lack a statutory basis.[6]

B. Even if Not Jurisdictional, the Requirements of Fed. R. App. P. 4(a)(5)(C) Appear to Be Mandatory; If So, They Must be Enforced, Unless Forfeited or Waived.

If the time limits found in Rule 4(a)(5)(C) are not jurisdictional, then they are considered "claim-processing rules." *See Union Pac. R.R. Co.*, 558 U.S. at 81–82 (noting dichotomy between rules that are properly considered jurisdictional and "claim-processing rules," which, although they may be "unalterable on a party's application," are subject to forfeiture "if the party asserting the rule waits too long to raise the point"); *see also Neff*, 598 F.3d at 322–23 (same). This Court has noted in the context of appeal-related deadlines that "[a] mandatory, though non-

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with the district court's order, but outside the time limit established by the Rules. *Id.* The D.C. Circuit held that Rule 4(a)(5)(C) was not jurisdictional, because it lacked a statutory basis, and was thus a claim-processing rule. *Id.* at 475–76.

[6] For the sake of completeness, Appellees note that the Fourth Circuit, in an unpublished opinion, noted without analysis that the requirement of Fed. R. App. P. 4(a)(5)(C) is "mandatory and jurisdictional." *United States v. Hawkins*, 298 F. App'x 275, 275 (4th Cir. 2008). Assuming, *arguendo*, this is a correct statement of the law of the Fourth Circuit, this does not appear to be the law of the Seventh Circuit.

jurisdictional, [claim-processing] rule must be enforced if a party invokes its protection." *Peterson*, 729 F.3d at 746; *see also Asher*, 505 F.3d at 741 ("But jurisdictional or not, the [10-day] time limit [in Fed. R. Civ. P. 23(f)] is mandatory— which means that it must be enforced if the litigant that receives its benefit so insists.").

Here, the language of Rule 4(a)(5)(C) appears mandatory, as there is nothing in the language of that rule that appears to grant the district court the discretion or the authority to extend the deadline past the time limits it sets forth. Thus, dismissal here appears mandatory, unless waived or forfeited by Appellees. Appellees submit that they have not committed forfeiture or waiver here. *See Trepanier v. City of Blue Island*, 364 F. App'x 260, 261 (7th Cir. 2010) (untimeliness argument preserved when asserted before addressing merits of appeal). In light of this (and for the sake of preserving the issue), Appellees request dismissal of the appeal on timeliness grounds.

C. The Unique Circumstances Doctrine May Still Exist, But is Likely Inapplicable Here.

Prior to *Bowles*, courts, including the Seventh Circuit, occasionally relied upon the judicially-created "unique-circumstances doctrine" to relieve appellants of dismissal where, for example, as here, their failure to meet a deadline was caused by reliance upon an official statement by a judicial officer. The state of the unique-circumstances doctrine in this Circuit, as it existed before *Bowles*, was recently summarized by this Court as follows:

> [The doctrine] operated as "[a]n apparent exception to th[e] otherwise strict application of

the 30–day appeal period." *Reinsurance Co. of Am.*, 808 F.2d [1249,] at 1252. The doctrine was based on a sort of estoppel theory:

> [A] petitioner's justifiable and ultimately detrimental reliance on a district court ruling granting the petitioner an extension of time in which to appeal amount[s] to "unique circumstances" when the court of appeals later reversed the district court, leaving petitioner without recourse to either the expired 30–day time period or the extension of time the district court had granted.

Id.

More generally, "unique circumstances" for an extension of time would be found to exist "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989); *see also Thompson v. INS*, 375 U.S. 384, 385–89 (1964) (per curiam) (finding that an assurance by the district court that a posttrial motion had been timely and thus extended the time for appeal was a "unique circumstance" allowing appeal to be heard even if the motion in truth had been untimely and would not have extended time for appeal); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (per curiam) ("In view of the obvious great hardship to a party who relies upon the trial judge's finding of

> 'excusable neglect' prior to the expiration of the 30–day period and then suffers reversal of the finding, it should be given great deference by the reviewing court.").
>
> Our circuit took a "narrow view" of this doctrine; we said it was "available *only* when there is a genuine ambiguity in the rules to begin with, and the court resolves that ambiguity in the direction of permitting additional time to appeal." *Props. Unlimited, Inc. Realtors v. Cendant Mobility Servs.*, 384 F.3d 917, 922 (7th Cir. 2004) (emphasis added). In that limited situation, the party relying on the judicial pronouncement had the equities on his side.

Satkar Hospitality, Inc. v. Fox Television Holdings, 767 F.3d 701, 707–08 (7th Cir. 2014) (alterations and emphasis in original).

Bowles purported to overrule the unique-circumstances doctrine (and the cases that created it—*Harris Truck Lines* and *Thompson*).[7] *Bowles*, 551 U.S. at 213–14. Indeed, this Court has referred to the doctrine as "defunct" and held that "the Supreme Court brought an end to the unique-circumstances doctrine in *Bowles*." *Satkar*, 767 F.3d at 707–08.

Nevertheless, *Bowles* arguably at least leaves open the possibility that the unique-circumstances doctrine survives, if only for violations of non-jurisdictional, claim-processing rules. In bringing an end to the doctrine, the Supreme Court held, "[W]e reject Bowles' reliance on the doctrine, and we overrule *Harris Truck*

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[7] *See* note 2, *supra*.

Lines and *Thompson to the extent they purport to authorize an exception to a jurisdictional rule.*" 551 U.S. at 214 (emphasis added). In other words, *Harris* and *Thompson* may survive to the extent they would authorize an exception to a non-jurisdictional, claim-processing rule.

Wright and Miller have described the state of the unique-circumstances doctrine as follows:

> If the district court grants the extension, the extension can run only until the later of 30 days from the original appeal deadline or 14 days after entry of the order granting the extension. If the district court purports to grant more time than that, the appellant should nonetheless make sure to file the notice of appeal within the time allowed by Rule 4(a)(5)(C), not within the purported longer deadline.
>
> A litigant who ignores this principle might try to rely on the doctrine of "unique circumstances," which has been applied where a would-be appellant that could have acted has failed to do so because it was misled by something the court has done. Such a strategy has sometimes worked in the past. But the continued viability of the "unique circumstances" doctrine is in considerable doubt; as will shortly be discussed, the doctrine has been overruled to the extent that it offered relief from jurisdictional deadlines. Four Justices have characterized the "unique circumstances" doctrine as having been "repudiated" by later cases, and five Justices have stated that the doctrine's validity has been "rightly questioned." The courts of appeals,

> which often express skepticism about whether the doctrine even survives, construe it extremely narrowly. The "unique circumstances" doctrine is, at best, on life support. In addition, assuming that the doctrine survives to some extent, it is presently unclear whether the doctrine would be available at all to an appellant who filed its notice of appeal outside the latest time permitted by Rule 4(a)(5)(C). A somewhat analogous circumstance was presented in Bowles v. Russell, where the district court purported to reopen the time for appeal to a date later than that permitted by Rule 4(a)(6) and Section 2107. Bowles' notice—filed within the time set by the district court but outside the time permitted by the rule and statute—was held untimely, and because the Supreme Court viewed Rule 4(a)(6)'s 14-day limit as a jurisdictional limit, it held the unique circumstances doctrine inapplicable. The question, for present purposes, is whether Rule 4(a)(5)'s 30-day and 10-day deadlines are jurisdictional within the meaning of Bowles. There is a plausible argument that they are not: Bowles relied heavily on the fact that Rule 4(a)(6)'s 14-day time limit was also set by statute, and (interestingly) Section 2107 does not contain the 30-day and 14-day limits set by Rule 4(a)(5)(C).

Charles Alan Wright, et al., *supra*, n.4 (citations omitted).

Even if the unique-circumstances doctrine does survive, however, it is likely not applicable here. As

noted above, in this Circuit the doctrine has traditionally been "available *only* when there is a genuine ambiguity in the rules to begin with, and the court resolves that ambiguity in the direction of permitting additional time to appeal." *Props. Unlimited, Inc. Realtors,* 384 F.3d at 922 (emphasis added). Here, there is arguably no ambiguity in Rule 4(a)(5)(C). Nevertheless, it is plausible that the unique-circumstances doctrine could be applied here, if this Court finds both (1) that the deadlines in Rule 4(a)(5)(C) are not jurisdictional, and (2) that there was "a genuine ambiguity in the rules to begin with, and the [district] court resolve[d] that ambiguity in the direction of permitting additional time to appeal." *Id.*

D. Hamer May Have An Argument that the Motion for Extension of Time Filed in the District Court Itself Served as the Functional Equivalent of a Notice of Appeal.

The final possibly extant argument for allowing Hamer's appeal to proceed that Appellees have been able to locate is that her motion for extension of time (which was filed within 30 days of the entry of final judgment) could be treated as the "functional equivalent" of a Notice of Appeal. This possibility was described by Wright and Miller, as follows:

> As an alternative to the unique-circumstances doctrine, a litigant might also argue that the Rule 4(a)(5) motion itself served as the functional equivalent of a notice of appeal; courts have sometimes, though not always, accepted such arguments. (An analogous argument, if made, might have saved Mr.

> Bowles' appeal, but there is no indication that the argument was presented to the Court.) In any event, no litigant should wish to find themselves in the position of having to argue these interesting questions; rather, litigants should make sure to file a notice of appeal within Rule 4(a)(5)(C)'s time limits even if the district court's order purports to authorize a filing outside those limits.

Charles Alan Wright, et al., *supra*, n.4 (citations omitted).

This Court has historically utilized the functional equivalent standard in circumstances similar to the instant appeal. In *Listenbee v. City of Milwaukee*, 976 F.2d 348 (7th Cir. 1992), this Court accepted a timely filed motion for extension as the "functional equivalent" of notice of appeal where, similarly to here, the district court had granted a longer extension than was permissible under Rule 4(a) and the appellant acted in apparent reliance upon that order. *Id.* at 350 (citing *Smith v. Barry*, 502 U.S. 244 (1992) (holding that "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.")).[8]

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[8] It is unclear from the *Listenbee* opinion whether, as here, appellant's attorney requested the impermissibly long extension, or whether, by contrast, the error was solely that of the district court. It is also unclear from the opinion what the contents of the motion for extension were, *i.e.*, whether the motion stated a definitive intention to appeal, or whether, by contrast, the motion was equivocal as to whether the appellant would in fact appeal, as Hamer's was.

More recently, this Court accepted a potentially late-filed appeal using the "functional equivalent" standard. *See Abrahamson v. Ill. Dep't of Fin. and Prof'l Regulation*, 594 F. App'x 307, 310 (7th Cir. 2014). It bears noting, however, that in *Abrahamson*, this Court noted that the appellant's motion for extension of time in the district court "convey[ed] Abrahamson's intent to appeal the dismissal of his lawsuit." *Id.* Indeed, that was the case, as the appellant's motion for extension of time stated, *inter alia*, "The Plaintiff intends to appeal this Court's denial of his Motion to Reconsider." (*See* Exhibit A.) Here, by contrast, Hamer's motion for extension contained no such definitive statement of intent to appeal; rather, the motion purported to seek more time so that "new counsel for Charmaine Hamer [could] evaluate this Court's judgment and determine whether an appeal should be pursued." (Dkt. 103.)

Likewise, in *Michener v. United States*, 499 F. App'x 574 (7th Cir. 2012), this Court construed a *pro se* litigant's letter to the district court labeled "notice of my intent to appeal" as the functional equivalent of a notice of appeal. *Id.* at 577. This Court noted that "[p]articularly for a litigant proceeding pro se . . . that information was sufficient . . . because it apprised the court and parties of Michener's desire to appeal." *Id.* It bears noting, however, that here not only was Hamer's motion not a definitive statement of her intention to appeal, but Hamer was not proceeding *pro se* at the time she moved for extension in the district court, a factor this Court appeared to rely heavily upon in *Michener* and the cases cited therein.

CONCLUSION

In light of the foregoing, Appellees request that this Court dismiss Hamer's appeal as untimely. In the alternative, Appellees request that this Court allow Appellees to preserve the issue for further briefing during merits briefing.

Respectfully submitted,

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO,

By: /s/ Gwendolyn B. Morales (by permission)
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Dated: January 8, 2016

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

11-CV-2038

Judge Lee

[Filed March 26, 2013]

BRUCE ABRAHAMSON, M.D. Plaintiff,	)
v.	)
ILLINOIS DEPARTMENT OF FINANCIAL & PROFESSIONAL REGULATION, et al. Defendant.	)

MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 4(A)(5)

NOW COMES the Plaintiff, Bruce Abrahamson, M.D., by and through his attorneys Brown, Udell, Pomerantz & Delrahim, Ltd., and moving for an extension of time to file his Notice of Appeal, states as follows:

1. This Honorable Court granted the Defendants' Motion to Dismiss[1] the Plaintiffs' Complaint[2] pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure ("FRCP") on July 10, 2012[3].

2. The Plaintiff filed a timely Motion to Alter or Amend the Court's July 10, 2012 ruling (the "Motion to Reconsider") pursuant to FRCP 59(e) on August 7, 2012[4].

3. In an Order dated February 26, 2013[5] (the "February 26 Order"), the Court denied the Plaintiff the relief he sought in his Motion to Reconsider.

4. Per Federal Rule of Appellate Procedure ("FRAP") 4(A)(1)(a), "In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."

5. The Plaintiff intends to appeal this Court's denial of his Motion to Reconsider.

6. Per F.R.A.P. 4(A)(4)(a)(iv)-(v), if a party timely files in the district court either a motion to alter

---

[1] Doc.# 18, 19

[2] Doc.# 1

[3] Doc.# 32, 33

[4] Doc.# 34

[5] Doc.# 40

or amend the judgment or for a new trial (both under FRCP 59), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.

7. The Plaintiff's appeal of the February 26 Order is therefore due on March 28, 2013.

8. Per F.R.A.P. 4(A)(5)(a)(i)-(ii), the district court may extend the time to file a notice of appeal if a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

9. The instant Motion is brought before this Court before the expiration of 30 days from the Court's February 26 Order.

10. The Plaintiff's mother has recently been ill and attending to her needs has taken much of the Plaintiff's time before and since the February 26 Order. The Plaintiff, accordingly, has not had adequate time to discuss a possible appeal with counsel.

11. In addition, Plaintiffs' counsel is investigating possible avenues for an appeal and requires additional time to complete its research.

12. Good cause, therefore, exists to extend the deadline for the Plaintiff to file his notice of appeal.

13. The Defendants will not be prejudiced by the granting of an extension.

WHEREFORE, the Plaintiff prays this Honorable Court enter an order granting the Plaintiffs' motion for

an extension of time to file his Notice of Appeal by 30 days.

Respectfully submitted,

BRUCE ABRAHAMSON, M.D.

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One of his attorneys

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[*Certificate of Service Omitted in Printing of this Appendix.*]

APPENDIX J

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 15-3764

[Filed February 3, 2016]

CHARMAINE HAMER,
Plaintiff-Appellant,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, and FANNIE MAE,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:12 cv-10150

Ruben Castillo, Chief Judge.

February 3, 2016

By the Court:

ORDER

On consideration of "APPELLEES' MEMORANDUM ADDRESSING TIMELINESS OF APPEAL" filed on January 8, 2016, and "APPELLANT'S RESPONSE TO APPELLEES' MEMORANDUM ON TIMELINESS OF THIS APPEAL" filed on February 1, 2016,

IT IS ORDERED that the issue of appellate jurisdiction is taken with the case. This appeal shall proceed to briefing. The briefing schedule is as follows:

1. The plaintiff-appellant shall file her brief and required short appendix on or before March 14, 2016.

2. The defendants-appellees shall file their joint brief on or before April 13, 2016.

3. The plaintiff-appellant shall file her reply brief, if any, on or before April 27, 2016.

IT IS FURTHER ORDERED that the parties fully address in their respective briefs the issue of appellate jurisdiction raised in the court's order of December 31, 2015.

NOTE: **Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to cover. The language in the rule that "[t]he disk contain nothing more than the text of the brief..." means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the**

word count should be omitted. The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.

RECORD
AND
BRIEFS

FILED
JAN 18 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER,
PETITIONER,
v.

NEIGHBORHOOD HOUSING SERVICES
OF CHICAGO & FANNIE MAE,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the 30-day limit for an extension of time to file a notice of appeal set forth in Federal Rule of Appellate Procedure 4(a)(5)(C) is a jurisdictional rule, as opposed to a non-jurisdictional, claim-processing rule.

CORPORATE DISCLOSURE STATEMENT

Respondent Federal National Mortgage Association (Fannie Mae) is a private, federally chartered corporation. It does not have a parent corporation, and no publicly held company owns ten percent or more of its stock.

Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit corporation incorporated in Illinois. It does not have a parent corporation, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION AND SUMMARY 1

STATEMENT 2

A. Facts and District Court Proceedings 2

B. Proceedings in the Court of Appeals 5

C. The Court of Appeals' Decision 6

REASONS FOR DENYING THE PETITION 6

A. Any conflict of authority is new and should be allowed to develop more fully before this Court intervenes 6

B. This case is a poor vehicle, as it would not provide this Court with an opportunity to hear and consider all the relevant arguments on both sides of the issue 9

C. There are multiple other grounds to affirm the district court's judgment 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Abel v. *Sullivan*,
326 F. App'x 431 (9th Cir. 2009) 7, 9, 10

Asher v. *Baxter International Inc.*,
505 F.3d 736 (7th Cir. 2007) 11

Bowles v. *Russell*,
551 U.S. 205 (2007) 1, 5, 6, 8

Freidzon v. *OAO LUKOIL*,
644 F. App'x 52 (2d. Cir. 2016) 8

Peters v. *Williams*,
353 F. App'x 136 (10th Cir. 2009) 8

Peterson v. *Somers Dublin Ltd.*,
729 F.3d 741 (7th Cir. 2013) 11

Smith v. *Barry*,
502 U.S. 244 (1992) 9

United States v. *Hawkins*,
298 F. App'x 275 (4th Cir. 2008) 8

Youkelsone v. *Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011) 7

Statutes

28 U.S.C. 2107(c) 4, 6

Other Authorities

Federal Rule of Appellate Procedure
4(a)(5)(C) ..... *passim*

Federal Rule of Appellate Procedure 4(a)(6) 5, 6

Ninth Circuit Rule 36-3(a) 7

Second Circuit Rule 32.1.1(a) 8

Tenth Circuit Rule 32.1(a) 8

INTRODUCTION AND SUMMARY

This case is a poor candidate for certiorari. Any conflict of authority on this issue is new and not well-developed, so there is no need for this Court to intervene. Further, this case would not be a good vehicle for resolving the Question Presented. In light of the unusual way in which this issue arose in the Seventh Circuit, neither party is in the best position to provide this Court with a full, adversarial exposition of the issue to be resolved. And in any event, a reversal would not make a difference in the ultimate outcome of this lawsuit.

Here are the basic facts: After losing on the merits of her discrimination claims, Petitioner parted ways with her appointed counsel. To allow time for her to make other arrangements, counsel successfully moved for an order extending the time for appeal by 60 days. Unfortunately, this violated Federal Rule of Appellate Procedure 4(a)(5)(C), which provides that an extension of time for appeal may not exceed *30* days. Acting *pro se*, Petitioner filed a notice of appeal within the time allowed by the court's order but not within the 30 days in Rule 4(a)(5)(C). Upon noticing this issue *sua sponte*, the Seventh Circuit asked Respondents to brief the question whether the 30-day limit in Rule 4(a)(5)(C) is jurisdictional.

Recognizing that Petitioner was an individual proceeding *pro se*, Respondents took a conservative approach. They examined *Bowles* v. *Russell*, 551 U.S. 205 (2007)—along with a published decision by the D.C. Circuit on the issue—and took the position that the 30-day limit in Rule 4(a)(5)(C) was likely *not* a jurisdictional barrier to Petitioner's appeal. The Sev-

enth Circuit ultimately disagreed and dismissed the appeal for lack of jurisdiction.

Despite this series of unfortunate events for Petitioner, there is no reason for this Court to intervene—and several reasons why it should not. *First*, only two courts of appeals have issued precedential decisions on this subject—the D.C. Circuit in 2011, and the Seventh Circuit in this case. Accordingly, any conflict of authority here is new and not well-developed. All the other decisions cited by Petitioner on this issue are unpublished, have no precedential value, and contain relatively cursory discussions of the issue presented in this case. *Second*, because of the unique manner in which the issue arose in this case and the positions taken below, it would be difficult for either Respondents or Petitioner to present a full exposition of the issues in this Court. *And third*, because there were and are other grounds to affirm the district court's judgment—including the mandatory nature of Rule 4(a)(5)(C), even if it is *not* jurisdictional—it is highly unlikely that a reversal of the Seventh Circuit's decision would alter the ultimate outcome of this case. We respectfully ask that this Court deny the Petition.

STATEMENT

A. Facts and District Court Proceedings

Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit neighborhood revitalization organization that creates opportunities for people to live in affordable homes. Respondent Fannie Mae is a federally chartered private corporation that provides financial services to low and moderate income families to help them purchase homes. In partnership with NHS, Fannie Mae operates the

Fannie Mae Mortgage Help Center in Chicago. Petitioner worked at the Center for several years as an employee of NHS.

Petitioner's tenure was riddled with performance issues, including confrontational behavior and a repeated failure to come to work on time. Pet. App. 10–14. She applied for promotions but did not receive them, in light of her performance issues and the superior performance of the other candidates. *Id.* at 14–18. Over time, Petitioner's confrontational behavior became increasingly disruptive to the work environment, so in March 2012 she was relieved of her duties at the Mortgage Help Center. *Id.* at 20. NHS ultimately offered her another position, explaining that it was the only remaining position that would be appropriate for her. She declined that position—which would have resulted in lower pay—and thus voluntarily resigned. *Id.* at 21–22.

Several months later, Petitioner filed a *pro se* complaint in the U.S. District Court for the Northern District of Illinois, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. She requested that counsel be appointed, and the district court granted her request. Just a few months later, however, counsel moved to withdraw. The district court granted this request and appointed a second counsel. That counsel withdrew as a result of a conflict, so the court appointed a third. After seven months, when the third counsel also moved to withdraw, the court made yet another appointment.

Following the close of discovery, Respondents NHS and Fannie Mae filed separate motions for summary judgment. Petitioner opposed the motions,

represented by her fourth court-appointed counsel. The district court granted summary judgment in Respondents' favor on all counts. Pet. App. 7 *et seq.* With respect to the discrimination claims, the court found that Petitioner had failed to establish that any of NHS's reasons for declining to promote her were a pretext for age or sex discrimination. With respect to her retaliation claims, the district court found that Petitioner had not been constructively discharged but instead had voluntarily resigned—and that she had failed to adduce evidence that there was a causal connection between any protected activity and her removal from her position at the Mortgage Help Center. The district court entered judgment on September 14, 2015. Thus, her original deadline to file her notice of appeal was October 14, 2015.

On October 8, 2015, Petitioner's fourth court-appointed counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal." Pet. App. 57–59. The motion requested that the district court "extend the deadline to file any Notice of Appeal to December 14, 2015, pursuant to 28 U.S.C. 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." Pet. App. 58 ¶ 3. The district court granted the motion on the same day, entering an order that stated, "The Court will give Plaintiff until December 14, 2015 to file a Notice of Appeal." *Id.* at 60. In apparent reliance on that order, Petitioner—acting *pro se*—filed her notice of appeal on December 11, 2015. *Id.* at 61.

B. Proceedings in the Court of Appeals

When the case reached the Seventh Circuit, that Court entered an Order *sua sponte* that instructed Respondents to file a brief "addressing the timeliness of this appeal." Pet. App. 66–67. In compliance with that order, Respondents filed their "Memorandum Addressing Timeliness of Appeal." *Id.* at 68 *et seq.* Sensitive to the fact that Petitioner was proceeding on her appeal *pro se*—as well as to the fact that the Seventh Circuit had directed its request for briefing to Respondents alone—Respondents effectively abandoned their fully adversarial posture for purposes of the submission and took pains to present the Seventh Circuit with a full and neutral exposition of the issue. Respondents' brief alerted the Seventh Circuit to all potential avenues and relevant authorities by which the court could, if it chose, relieve Ms. Hamer of the district court's violation of Rule 4(a)(5)(C) and allow her appeal to proceed to the merits. To that end, Respondents analyzed the *Bowles* decision in detail and ultimately concluded that it turned on the notion that Rule 4(a)(6)—the rule at issue in that case—is tied to a statutory time limitation. Pet. App. 71–71. Rule 4(a)(5)(C), on the other hand, is not. *Id.* at 74–75. This analysis led Respondents to conclude that the 30-day limitation in Rule 4(a)(5)(C) is "likely not jurisdictional under the reasoning of *Bowles*" and subsequent Seventh Circuit authority. *Id.* at 75–77.

The Seventh Circuit then ordered Petitioner—still *pro se*—to file a response memorandum addressing the timeliness of the appeal. Upon receiving this submission, the Seventh Circuit issued an order noting that "the issue of appellate jurisdiction is taken with the case" and further ordering that "the parties fully address in their respective briefs the issue of

appellate jurisdiction raised in the court's order of December 31, 2015" (emphasis in original).

In merits briefing, Respondents reiterated their position that "it does not appear to be the law in this Circuit that Hamer's failure to abide by Fed. R. App. P. 4(a)(5)(C) is a jurisdictional defect in the strict sense of the term." Respondents set forth other reasons for rejecting the appeal, however, both on the basis of untimeliness as well as on the merits.

C. The Court of Appeals' Decision

After hearing oral argument, the Seventh Circuit disagreed with the parties and held that "[l]ike Rule 4(a)(6) [the rule at issue in *Bowles*], Rule 4(a)(5)(C) is the vehicle by which [28 U.S.C.] 2107(c) is employed and it limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days." On that basis, the court dismissed the appeal for lack of jurisdiction, without reaching either the merits of Petitioner's claims or the merits of Respondents' other, non-jurisdictional arguments.

REASONS FOR DENYING THE PETITION

A. Any conflict of authority is new and should be allowed to develop more fully before this Court intervenes.

In essence, the Petition argues that the Seventh Circuit made a mistake in this case—namely, that it reached the wrong decision with respect to the jurisdictional impact of Rule 4(a)(5)(C). To the extent its decision creates a conflict of authority, however, that conflict is new, shallow, and undeveloped. Before this case, only one court of appeals—the D.C. Circuit—had issued a precedential ruling on the issue. The

other courts to weigh in on the subject have done so only in unpublished decisions and with relatively cursory reasoning.

As Petitioner notes, the D.C. Circuit has held that the 30-day time limit in Rule 4(a)(5)(C) is not jurisdictional. *Youkelsone* v. *Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011). The court based its decision on the notion that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction," and the 30-day limit contained in Rule 4(a)(5)(C) does not derive from any statute. *Id.* at 475. Accordingly, the limitation is a claim-processing rule that may be—and was in that case—forfeited or waived. *Id.* at 475–76.

Petitioner contends that the Ninth Circuit has reached the same conclusion, but that court's discussion of the issue is dicta and unpublished, and it has never been cited in a subsequent case. See Pet. 9–10 (citing *Abel* v. *Sullivan*, 326 F. App'x 431 (9th Cir. 2009)); Ninth Cir. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.") In the course of considering a late-filed notice of appeal, the Ninth Circuit included a single sentence stating that Rule 4(a)(5)(C)'s time limitation is not jurisdictional because it "is not derived from statute." *Abel*, 326 F. App'x at 32 (citing *Bowles*, 127 S. Ct. at 2364–65). But the court went on to find jurisdiction on an independent basis—namely, based on its conclusion that an earlier-filed and timely motion for extension of time served as the "functional equivalent" of a notice of appeal. *Id.* at 432–33. Accordingly, the Ninth Circuit's discussion of the issue is not only nonprecedential but dicta as well.

On the other side of the question, the Seventh Circuit—in the decision below—is the first and only court of appeals to adopt a precedential rule holding that the 30-day limit in Rule 4(a)(5)(C) is jurisdictional. Among the cases that Petitioner cites for the same proposition, none has precedential value:

- *Freidzon* v. *OAO LUKOIL*, 644 F. App'x 52 (2d. Cir. 2016), is an unpublished "summary order." Pursuant to the Second Circuit Local Rules, such summary orders "do not have precedential effect." See Second Cir. L.R. 32.1.1(a).
- *United States* v. *Hawkins*, 298 F. App'x 275 (4th Cir. 2008), is an unpublished *per curiam* opinion. The opinion notes, "Remanded by unpublished PER CURIAM opinion. Unpublished opinions are not binding precedent in this circuit." *Id.* Furthermore, the Fourth Circuit's comment in *Hawkins* that the time limit found in Rule 4(a)(5)(C) was jurisdictional is dicta in any event, as the scope of Rule 4(a)(5)(C) was not at issue in the case.
- *Peters* v. *Williams*, 353 F. App'x 136 (10th Cir. 2009), is also an unpublished *per curiam* opinion. Pursuant to the Tenth Circuit's local rules, "[u]npublished decisions are not precedential, but may be cited for their persuasive value." See Tenth Cir. R. 32.1(a).

As for the rest of the courts of appeals—the First, Third, Fifth, Sixth, Eighth, Eleventh, and Federal Circuits—those courts have not addressed the issue at all since *Bowles*.

In short, any conflict of authority on this issue is new and shallow. Only the D.C. and Seventh Circuits have issued published decisions on the issue. It

would be premature for this Court to intervene; the courts of appeals should be granted further time to consider the issue and develop a consensus on their own.

B. This case is a poor vehicle, as it would not provide this Court with an opportunity to hear and consider all the relevant arguments on both sides of the issue.

In light of the unique manner in which this case presented itself in the Seventh Circuit, it does not present a good vehicle in which to resolve the Question Presented. Neither the Petitioner nor the Respondents are in the best position to present this Court with the most fulsome exposition of the issue.

For her part, Petitioner briefed and presented oral argument in the Seventh Circuit *pro se*, and she did not make all available arguments. For example, she did not affirmatively argue that her appeal was timely on the ground that her appointed counsel's motion for withdrawal and extension of time—filed within 30 days of the original judgment—was the "functional equivalent" of a notice of appeal. *Smith* v. *Barry*, 502 U.S. 244, 248–49 (1992).[1] That is the argument the Ninth Circuit relied upon in *Abel* in finding an alternative basis upon which to exercise jurisdiction. 326

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[1] Respondents' submissions in the Seventh Circuit explained the idea of a functional equivalent but argued that the motion filed by Petitioner's withdrawing counsel would not have met that test. Although Petitioner did offer some responses to those points—in her response to the jurisdictional submission, and in her reply brief on the merits—the Seventh Circuit apparently did not understand her to be making an affirmative argument that her motion for extension of time was the functional equivalent of a timely notice of appeal. If she *had* made that argument, presumably the Seventh Circuit would have addressed it.

F. App'x 431. The Court's consideration of the full implications of the Question Presented would be incomplete without that argument, which Petitioner would not be in the best position to make.

As for Respondents, their ability to defend the Seventh Circuit's reasoning before this Court would be impaired by the fact that they took the opposite position below. The Seventh Circuit raised the jurisdictional issue *sua sponte*, before either side had filed a merits brief. It instructed Respondents (and only Respondents) to file a brief addressing the timeliness of the appeal. In preparing their brief, Respondents were cognizant of both Petitioner's *pro se* status and the fact the Seventh Circuit was, at that time, relying upon Respondents alone to inform the Court about the issue. In light of this dynamic, Respondents took particular care to present the issue in a non-adversarial and neutral way, ultimately taking the view that the time limit at issue here "does not appear to be jurisdictional according to the law of this Circuit." Pet. App. 71 *et seq.*

If this Court were to grant certiorari in this case, Respondents would be called upon to defend the Seventh Circuit's position. In the briefing, however, Petitioner would presumably attempt to undermine Respondents' presentation with the contents of their own submissions and arguments before the Seventh Circuit. This is far from ideal. To the extent this Court's intervention is warranted at all, it should wait for a case in which the issue was—and can be before this Court—the subject of a thorough and unimpaired adversarial process.

C. There are multiple other grounds to affirm the district court's judgment.

Certiorari would also be inappropriate here given that the jurisdictional issue is unlikely to make a difference in the ultimate outcome of the case. As the district court's thorough opinion demonstrates (Pet. App. 7–47), Petitioner's claims for discrimination and retaliation are exceedingly weak on their merits. After extensive discovery (throughout which Petitioner was represented by counsel), the district court granted summary judgment on multiple grounds, finding, among other things, that she had voluntarily resigned her employment with Respondent NHS and had not suffered an involuntary termination.

Moreover, the untimeliness of Ms. Hamer's appeal may be fatal even if the 30-day limitation in Rule 4(a)(5)(C) is *not* jurisdictional. At a minimum, the 30-day limitation is a claim-processing rule, which—in the Seventh Circuit at least—must be observed if not forfeited or waived. *Asher* v. *Baxter International Inc.*, 505 F.3d 736, 741 (7th Cir. 2007); *Peterson* v. *Somers Dublin Ltd.*, 729 F.3d 741, 746 (7th Cir. 2013). Respondents argued below that they neither forfeited nor waived the argument that Petitioner's appeal violated a mandatory claim-processing rule, having raised that issue before merits briefing.

In other words, even if this Court were to reverse the decision of the Seventh Circuit, it is highly likely that the Seventh Circuit will affirm dismissal on one or more alternative grounds. To the extent the Question Presented in this case ultimately requires this Court's attention, this Court should grant review in a case where its decision will make a difference in the outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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RECEIVED
AND
BRIEFS.

No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES
OF CHICAGO & FANNIE MAE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. A Circuit Conflict Undisputedly Exists, and Is Sufficiently Developed for This Court's Review 3

II. This Case Is an Excellent Vehicle to Address the Question Presented 5

A. The Parties Are Well-Suited to Present Arguments on the Jurisdictionality of Rule 4(a)(5)(C) 5

B. No Other Issues Prevent This Court from Addressing the Jurisdictionality of Rule 4(a)(5)(C) 8

1. Respondents' View of the Merits of Ms. Hamer's Employment-Discrimination Claims Does Not Warrant the Denial of Certiorari 8

2. Respondents' Remaining Nonjurisdictional Arguments Do Not Warrant the Denial of Certiorari 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Abel v. Sullivan,
326 F. App'x 431 (9th Cir. 2009) 4, 5

Bowles v. Russell,
551 U.S. 205 (2007) 11

Capron v. Van Noorden,
6 U.S. 126 (2 Cranch 126) (1804) 6

Gonzalez v. Thaler,
132 S. Ct. 641 (2012) 10

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,
371 U.S. 215 (1962) 11

Kingsley v. Hendrickson,
135 S. Ct. 2466 (2015) 3

Kirtsaeng v. John Wiley & Sons, Inc.,
136 S. Ct. 1979 (2016) 3, 4

Kontrick v. Ryan,
540 U.S. 443 (2004) 6, 10

Krupski v. Costa Crociere S.p.A,
560 U.S. 538 (2010) 4

Mata v. Lynch,
135 S. Ct. 2150 (2015) 6

Mobley v. C.I.A.,
806 F.3d 568 (D.C. Cir. 2015) 10, 12

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 6

Thompson v. Immigration & Naturalization Serv.,
375 U.S. 384 (1964) 11

United States v. Hawkins,
298 F. App'x 275 (4th Cir. 2008) 5

Youkelsone v. Fed. Deposit Ins. Corp.,
660 F.3d 473 (D.C. Cir. 2011) 3

STATUTES AND RULES

28 U.S.C. § 2107(a) 7

Fed. R. App. P. 4(a)(1)(A) 7

Fed. R. App. P. 4(a)(5)(C) ..... *passim*

OTHER AUTHORITIES

16A Charles Alan Wright & Arthur R. Miller,
Federal Practice & Procedure (4th ed. 2008) .. 12

INTRODUCTION

Respondents Neighborhood Housing Services of Chicago and Fannie Mae (collectively "Respondents") do not dispute most of the arguments that Petitioner Charmaine Hamer ("Ms. Hamer") makes in support of certiorari.

Respondents do not dispute that the Seventh Circuit's decision is in direct conflict with this Court's precedents, and they make no attempt to defend the Seventh Circuit's judgment. Indeed, as the Petition explains in detail (Pet. 11-13), this Court has repeatedly held that court-promulgated rules that do not derive from a statute are not jurisdictional in nature. Therefore, the Seventh Circuit's conclusion that Federal Rule of Appellate Procedure 4(a)(5)(C)—which does not derive from a statute—can deprive a court of appeals of jurisdiction is not only erroneous, but also irreconcilable with this Court's cases. The Brief for Respondents in Opposition ("Opposition" or "Opp.") offers no response to this argument. Certiorari is warranted to address the Seventh Circuit's departure from this Court's precedents.

Respondents also do not dispute that there is a circuit conflict on the jurisdictionality of Rule 4(a)(5)(C); nor do they deny that the Question Presented is important and warrants this Court's review. Instead, Respondents mainly argue that certiorari should be denied: (i) because the circuit conflict is not sufficiently developed, (ii) because a grant of certiorari would require Respondents to argue—contrary to Respondents' arguments to the Seventh Circuit—that Rule 4(a)(5)(C) *is* jurisdictional, and (iii) because Respondents believe that Ms. Hamer

should not prevail at the Seventh Circuit for reasons unrelated to the jurisdictionality of Rule 4(a)(5)(C).

Respondents' arguments opposing certiorari do not withstand scrutiny. First, Respondents place undue emphasis on the fact that some of the appellate courts that have addressed the jurisdictionality of Rule 4(a)(5)(C) have done so in unpublished decisions. But this argument fails to recognize that this Court grants certiorari to resolve conflicts among unpublished decisions from different courts of appeals, and it also grants certiorari where the decision under review is itself unpublished. Moreover, Respondents incorrectly argue that this case is a poor vehicle to address the jurisdictionality of Rule 4(a)(5)(C) merely because *Respondents themselves* argued to the Seventh Circuit that Rule 4(a)(5)(C) is not jurisdictional. But because the question of jurisdiction may be raised at any time, Respondents are free to argue to this Court that a violation of Rule 4(a)(5)(C) deprives a court of appeals of jurisdiction. Finally, Respondents' view that they should prevail at the Seventh Circuit on other grounds is not a basis for denying certiorari. Even if any of Respondents' arguments had merit—which they do not, as explained in further detail below—a conclusion by this Court that Rule 4(a)(5)(C) is a nonjurisdictional rule would require reversal of the Seventh Circuit's judgment, which explicitly states that the dismissal of Ms. Hamer's appeal is for lack of jurisdiction. Pet. App. 6.

ARGUMENT

I. A Circuit Conflict Undisputedly Exists, and Is Sufficiently Developed for This Court's Review

Respondents admit that the Seventh Circuit's decision is irreconcilable with the D.C. Circuit's decision in *Youkelsone v. Federal Deposit Insurance Corp.*, 660 F.3d 473 (D.C. Cir. 2011). Opp. 7. Indeed, Respondents are correct: *Youkelsone* held that Rule 4(a)(5)(C) was nonjurisdictional and concluded that the appellee had forfeited its right to seek dismissal for a violation of the Rule, and therefore addressed the merits of the appeal. *Youkelsone*, 660 F.3d at 475-76. The Seventh Circuit, in sharp contrast, held that Rule 4(a)(5)(C) is a jurisdictional rule that is not subject to forfeiture or waiver, and therefore refused to address the merits of the appeal. Pet. App. 4.

Nevertheless, Respondents seek to downplay the admitted circuit conflict concerning the jurisdictionality of Federal Rule of Appellate Procedure 4(a)(5)(C) by focusing on the fact that some of the appellate-court decisions that have addressed this issue are unpublished. Opp. 2, 6-9. Respondents are incorrect. Certiorari should not be denied merely because some of the decisions in a circuit conflict are unpublished. To the contrary, this Court grants certiorari to resolve circuit conflicts that involve unpublished decisions, and even grants certiorari to review decisions that are themselves unpublished. *E.g., Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (reviewing a decision that conflicted with the decisions of other courts of appeals, some of which were unpublished decisions); *see also Kirtsaeng v. John*

Wiley & Sons, Inc., 136 S. Ct. 1979, 1984 (2016) (reviewing an unpublished "brief summary order" that conflicted with the decisions of other courts of appeals); *Krupski v. Costa Crociere S.p.A*, 560 U.S. 538, 546 n.2 (2010) (reviewing an unpublished decision that conflicted with decisions from other circuits). Regardless, the unpublished nature of the decisions from some of the courts of appeals that have addressed the jurisdictionality of Rule 4(a)(5)(C) should not dissuade this Court from granting certiorari here, especially because the Seventh Circuit's precedential decision in this case: (i) conflicts with at least one precedential decision from the D.C. Circuit, as Respondents admit (*see* Opp. 6-8), and (ii) is irreconcilable with this Court's precedents, as Ms. Hamer argued in the Petition (Pet. 11-13) and is unchallenged in the Opposition. Moreover, the fact that different circuits come to opposite conclusions concerning the jurisdictionality of Rule 4(a)(5)(C)—and believe the issue to be too clear to warrant a precedential decision—highlights the confusion of the courts of appeals in this area and reinforces the need for this Court's intervention.

Respondents also wrongly argue that the Ninth Circuit's treatment of Rule 4(a)(5)(C) in *Abel v. Sullivan*, 326 F. App'x 431 (9th Cir. 2009) is dicta. Opp. 7. To the contrary, the Ninth Circuit in *Abel* concluded that it had jurisdiction over the appeal on two separate bases. *Abel*, 326 F. App'x at 432-33. First, the Ninth Circuit concluded it had jurisdiction over the appeal despite the appellant's violation of Rule 4(a)(5)(C) because the Rule does not derive from a statute. *Id.* at 432. Second, the Ninth Circuit concluded that it had jurisdiction over the appeal

because the appellant's timely filed motion for an extension of time constituted the functional equivalent of a notice of appeal. *Id.* at 432-33. Because the Ninth Circuit's conclusion that Rule 4(a)(5)(C) is nonjurisdictional establishes, by itself, that the Ninth Circuit had jurisdiction over the appeal, its discussion of Rule 4(a)(5)(C) is not dicta.[1]

Multiple courts of appeals have considered the jurisdictionality of Rule 4(a)(5)(C), and have reached differing conclusions. This Court should grant certiorari to resolve the circuit conflict.

II. This Case Is an Excellent Vehicle to Address the Question Presented

A. The Parties Are Well-Suited to Present Arguments on the Jurisdictionality of Rule 4(a)(5)(C)

Respondents argue that this Court should deny certiorari because the parties, especially Respondents, are not "in the best position to present this Court with the most fulsome exposition of the issue." Opp. 9. Respondents are mistaken.

Respondents argue that their ability to defend the Seventh Circuit's judgment is now "impaired" by their previous arguments to the Seventh Circuit that Rule 4(a)(5)(C) is not jurisdictional. Opp. 10. Respondents,

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[1] Additionally, although Respondents now dismiss the discussion of Rule 4(a)(5)(C) in *United States v. Hawkins*, 298 F. App'x 275 (4th Cir. 2008) as dicta (Opp. 8), Respondents themselves cited *Hawkins* to the Seventh Circuit to show that the Fourth Circuit has characterized Rule 4(a)(5)(C) as jurisdictional. Pet. App. 77 n.6.

however, ignore that a challenge to a federal court's subject-matter jurisdiction may be raised at any stage of litigation, even for the first time before this Court. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (citing *Capron v. Van Noorden*, 6 U.S. 126 (2 Cranch 126) (1804)). Therefore, Respondents' arguments to the Seventh Circuit do not impede them from arguing to this Court that Rule 4(a)(5)(C) is a jurisdictional rule. Although the fact that the Seventh Circuit adopted a jurisdictional rule in Respondents' favor—a rule that Respondents expressly advocated against—may reinforce the conclusion that the Seventh Circuit's decision was incorrect, Respondents' arguments to the Seventh Circuit provide no basis for denying certiorari. Moreover, if Respondents decline to defend the Seventh Circuit's judgment, this Court can appoint an *amicus curiae* to argue in support of the judgment, as this Court has done before. *See, e.g., Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015) (noting that an *amicus curiae* was appointed to defend the Fifth Circuit's judgment dismissing an appeal for lack of jurisdiction where the government did not support the jurisdictional holding); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (noting that an *amicus curiae* was appointed to defend the Second Circuit's conclusion that a copyright statute had jurisdictional significance where no party supported the jurisdictional holding). For these reasons, Respondents' arguments to the Seventh Circuit should not dissuade this Court from granting certiorari.

Additionally, Respondents mistakenly assert that Ms. Hamer is not in a position to argue the jurisdictionality of Rule 4(a)(5)(C) because she did not also argue that her October 8, 2015 motion for an

extension of time (Pet. App. 57-59) constituted the functional equivalent of a notice of appeal. Opp. 9-10. But as Respondents argued to the Seventh Circuit—an argument with which the Seventh Circuit implicitly agreed[2], and that Ms. Hamer does not challenge—that motion did not constitute the functional equivalent of a notice of appeal because, among other reasons, it "contained no . . . definitive statement of intent to appeal; rather, the motion purported to seek more time so that 'new counsel . . . [could] evaluate [the district court's] judgment and determine whether an appeal should be pursued.'" Pet. App. 85. Contrary to Respondents' implication (Opp. 9-10), the relevant inquiry in this case is whether the timing of Ms. Hamer's December 11, 2015 notice of appeal (Pet. App. 61)—which was undisputedly timely by statute but untimely under Rule 4(a)(5)(C)—deprived the Seventh Circuit of jurisdiction. Ms. Hamer's decision not to argue that her October 8, 2015 motion for an extension of time constituted the functional equivalent of a notice of appeal has no bearing on this question, and is therefore not an obstacle to this Court's ability to: (i) determine the jurisdictionality of Rule 4(a)(5)(C),

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[2] In dismissing the appeal for lack of jurisdiction, the Seventh Circuit implicitly concluded that the October 8, 2015 motion for an extension of time was not the functional equivalent of a notice of appeal. If it had concluded that the motion *was* the functional equivalent of a notice of appeal, the appeal would have been timely without any extension of time, because the motion was filed less than thirty days after the district court's entry of judgment. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). The Seventh Circuit therefore would not have dismissed the appeal if it had concluded that the motion for an extension of time was the functional equivalent of a notice of appeal.

and (ii) reverse the Seventh Circuit's judgment if it agrees with Ms. Hamer that this Rule is not jurisdictional.

B. No Other Issues Prevent This Court from Addressing the Jurisdictionality of Rule 4(a)(5)(C)

Respondents additionally argue that certiorari should be denied because Ms. Hamer's appeal to the Seventh Circuit might fail for reasons other than the Seventh Circuit's jurisdictional determination. Opp. 11. Respondents are wrong.

1. Respondents' View of the Merits of Ms. Hamer's Employment-Discrimination Claims Does Not Warrant the Denial of Certiorari

Failing to defend the Seventh Circuit's judgment, Respondents focus instead on the merits of Ms. Hamer's employment-discrimination claims. Opp. 11. Although Ms. Hamer strongly disagrees with Respondents' characterization of the facts leading to the termination of her employment (Opp. 3) and with Respondents' assessment of the merits of her discrimination claims, these issues are not relevant to the question before this Court: the jurisdictionality of Rule 4(a)(5)(C). Because the Seventh Circuit found that it lacked jurisdiction over the appeal, it did not reach the merits of Ms. Hamer's discrimination claims. Pet. App. 4. Therefore, the question before this Court is not whether the district court's grant of summary judgment was erroneous. Rather, the Question Presented—as applied to this case—is whether the Seventh Circuit had jurisdiction to consider Ms.

Hamer's arguments that summary judgment was improperly granted. If this Court grants certiorari and reverses the Seventh Circuit's jurisdictionality determination, the Seventh Circuit may then address the merits of the appeal, which Ms. Hamer continues to believe should result in the reversal of the district court's summary judgment in favor of Respondents. As it stands, however, the Seventh Circuit has not reviewed the district court's grant of summary judgment. Instead, it simply dismissed the appeal for lack of jurisdiction. Pet. App. 4-6. Certiorari is warranted to determine whether Rule 4(a)(5)(C) has jurisdictional implications.

2. Respondents' Remaining Nonjurisdictional Arguments Do Not Warrant the Denial of Certiorari

Respondents also wrongly argue that certiorari should be denied because Ms. Hamer's appeal could be dismissed under Rule 4(a)(5)(C) on nonjurisdictional grounds. Opp. 11. As an initial matter, Respondents are incorrect as a matter of procedure. Specifically, even if this Court were to conclude that (i) Rule 4(a)(5)(C) is nonjurisdictional, but that (ii) the Rule still requires dismissal, reversal of the Seventh Circuit's judgment would still be required because its judgment explicitly dismisses the appeal for lack of jurisdiction. Pet. App. 6. More importantly, however, Respondents ignore that if Rule 4(a)(5)(C) is found to be a nonjurisdictional claim-processing rule, then the Rule is subject to waiver, forfeiture, and the unique-circumstances doctrine. Indeed, as explained in detail below, waiver, forfeiture, and the unique-circumstances doctrine all excuse the timing of Ms. Hamer's notice of

appeal if this Court determines that Rule 4(a)(5)(C) is nonjurisdictional.

Nonjurisdictional rules are subject to waiver and forfeiture. *See, e.g., Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (distinguishing jurisdictional rules from nonjurisdictional claim-processing rules on the ground that, among other things, subject-matter jurisdiction is not subject to waiver or forfeiture); *Mobley v. C.I.A.*, 806 F.3d 568, 578 (D.C. Cir. 2015) (noting that because it is a claim-processing rule, "[o]bjections based on FRAP 4(a)(5)(C) therefore can be forfeited or waived."). If Rule 4(a)(5)(C) is found to be nonjurisdictional, Respondents forfeited—and in fact waived—any argument that Ms. Hamer's appeal was untimely under that Rule. First, Respondents forfeited their right to object to the district court's sixty-day extension of time for Ms. Hamer to file a notice of appeal. During the two months that passed between the district court's extension of time (Pet. App. 60) and Ms. Hamer's filing of her notice of appeal (Pet. App. 61), Respondents never opposed or otherwise objected to the district court's extension of time. Accordingly, Respondents forfeited their right to rely on Rule 4(a)(5)(C), because they "wait[ed] too long to raise the point." *Kontrick*, 540 U.S. at 456. Additionally, before the Seventh Circuit, Respondents affirmatively waived their right to rely on Rule 4(a)(5)(C) when they stated in their Joint Corrected Docketing Statement that the Seventh Circuit had jurisdiction over the case because "on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal" (Pet. App. 63), and then reiterated on the next page that "[Ms. Hamer] timely filed a Notice of Appeal[]" (Pet. App. 64). It was not until after the Seventh Circuit inquired about the appeal's timeliness

that Respondents argued that Ms. Hamer's appeal was untimely. Pet. App. 68-86. Accordingly, if Rule 4(a)(5)(C) is found to be nonjurisdictional, then Respondents' forfeiture and outright waiver preclude them from seeking dismissal under Rule 4(a)(5)(C).

Additionally, if Rule 4(a)(5)(C) is found to be nonjurisdictional, the unique-circumstances doctrine will excuse the timing of Ms. Hamer's notice of appeal. As the Seventh Circuit recognized, "Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal[.]" Pet. App. 4. Accordingly, if Rule 4(a)(5)(C) is determined to be a nonjurisdictional claim-processing rule, the unique-circumstances doctrine will preclude dismissal of Ms. Hamer's appeal under Rule 4(a)(5)(C). *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17 (1962) (finding that the "unique circumstances" of the case excused the late filing of a notice of appeal where the late filing was caused by the district court's erroneous extension of time); *see also Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 385-87 (1964) (recognizing that "unique circumstances" excused the late filing of a notice of appeal where the late filing was caused by the district court's erroneous assurance that the appellant had filed post-trial motions "in ample time"). This Court's treatment of the unique-circumstances doctrine in *Bowles v. Russell*, 551 U.S. 205 (2007) does not change the outcome. In *Bowles*, this Court limited the unique-circumstances doctrine established by *Harris Truck Lines* and *Thompson* only "to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 214. If Rule 4(a)(5)(C) is

nonjurisdictional, as Ms. Hamer argues, then the unique-circumstances doctrine will apply here. *See, e.g., Mobley*, 806 F.3d at 577-78 (applying the unique-circumstances doctrine to excuse the filing of an untimely post-judgment motion under a nonjurisdictional rule where the untimeliness was caused by the district court's erroneous assurance regarding the due date of post-trial motions); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. 2008) (noting that the unique-circumstances doctrine may be used to excuse noncompliance with nonjurisdictional rules).

In sum, Respondents' argument for dismissal of Ms. Hamer's appeal under Rule 4(a)(5)(C) on nonjurisdictional grounds lacks merit, and in any event should not dissuade this Court from granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

A district court may extend the time to file a notice of appeal in a civil case "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, . . . upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). Here, upon timely motion, the district court extended the time from October 14, 2015 to December 14, 2015 for Petitioner Charmaine Hamer ("Ms. Hamer") to file a notice of appeal. Ms. Hamer filed a notice of appeal within the time set by the district court. The United States Court of Appeals for the Seventh Circuit nevertheless *sua sponte* dismissed the appeal for lack of jurisdiction. In doing so, the Seventh Circuit concluded that it was deprived of jurisdiction because Ms. Hamer's notice of appeal was filed outside the time permitted by the Federal Rules of Appellate Procedure, which provide that "[n]o extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Fed. R. App. P. 4(a)(5)(C).

The question presented is as follows:

Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, and therefore subject to forfeiture or waiver by an appellee, or subject to equitable considerations such as the unique-circumstances doctrine.

PARTIES TO THE PROCEEDING

Petitioner is Charmaine Hamer. Ms. Hamer was plaintiff-appellant below.

Respondents are Neighborhood Housing Services of Chicago and Fannie Mae. Both were defendants-appellees below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

I. Proceedings in the District Court 2

II. Proceedings in the Seventh Circuit 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 9

I. Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule Because It Does Not Derive from a Statute 9

A. Rule 4(a)(5)(C) Has No Statutory Basis .. 9

B. Because Rule 4(a)(5)(C) Lacks a Statutory Basis, It Does Not Constitute a Limitation on a Court's Jurisdiction ... 13

C. Because Rule 4(a)(5)(C) Is Not a Jurisdictional Rule and Because Ms. Hamer's Appeal Was Statutorily Timely, the Seventh Circuit Erred in Concluding that It Lacked Jurisdiction Over Ms. Hamer's Appeal 18

II. Because Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule, an Appellee Can—as Respondents Did Here—Forfeit or Waive the Right to Seek Dismissal Under the Rule . . . 19

A. As a Nonjurisdictional Claim-Processing Rule, Rule 4(a)(5)(C) Is Subject to Forfeiture and Waiver by an Appellee . . 19

B. Respondents' Forfeiture and Waiver Here Preclude Them from Seeking Dismissal Under Rule 4(a)(5)(C) 21

1. Respondents Forfeited Their Right to Rely on Rule 4(a)(5)(C) by Failing to Raise Any Objection to the District Court 21

2. Respondents Forfeited Their Right to Rely on Rule 4(a)(5)(C) by Failing to Notice an Appeal or a Cross-Appeal from the District Court's Extension of Time 23

3. By Affirmatively Stating to the Seventh Circuit that Ms. Hamer's Appeal Was Timely, Respondents Waived and Forfeited Their Right to Seek Dismissal Based on Rule 4(a)(5)(C) 28

III. As a Nonjurisdictional Claim-Processing Rule, Federal Rule of Appellate Procedure 4(a)(5)(C) Is Subject to Equitable Considerations Such as the Unique-Circumstances Doctrine 29

A. Equitable Considerations Such as the Unique-Circumstances Doctrine Can Excuse Noncompliance with Rule 4(a)(5)(C) 30

1. This Court's Precedents Demonstrate that Equitable Considerations Can Excuse a Party Who Files a Belated Notice of Appeal in Reliance on a District Court's Order 30

2. Recognition of Equitable Considerations with Respect to Rule 4(a)(5)(C) Is Consistent with This Court's Treatment of Nonjurisdictional Deadlines and 28 U.S.C. § 2107(c) 36

a. Recognition of Equitable Exceptions Is Consistent with This Court's Treatment of Nonjurisdictional Statutory Deadlines 36

b. Recognition of Equitable Considerations Is Consistent with 28 U.S.C. § 2107(c) 38

3. Other Federal Rules and at Least One Other Federal Statute Confirm that the Unique-Circumstances Doctrine Can Excuse Noncompliance with Rule 4(a)(5)(C) 39

B. The Unique-Circumstances Doctrine Precludes Dismissal of the Appeal Here 41

CONCLUSION 43

STATUTORY APPENDIX

28 U.S.C. § 2107 (1988) 1a

PL 102–198, December 9, 1991, 105 Stat 1623 ... 2a

H.R. REP. 102-322, H.R. Rep. No. 322, 102ND Cong., 1ST Sess. 1991, 1991 WL 251360, 1991 U.S.C.C.A.N. 1303 (Leg.Hist.) 4a

PL 111-16, May 7, 2009, 123 Stat 1607 ..... 16a

PL 112-62, November 29, 2011, 125 Stat 756 ... 18a

TABLE OF AUTHORITIES

CASES

Abel v. Sullivan,
326 F. App'x 431 (9th Cir. 2009) 9, 17

Amatangelo v. Borough of Donora,
212 F.3d 776 (3d Cir. 2000) 24

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 13

Bowles v. Russell,
551 U.S. 205 (2007) ..... *passim*

Burnett v. N.Y. Cent. R.R. Co.,
380 U.S. 424 (1965) 37

Carlisle v. United States,
517 U.S. 416 (1996) 33, 37

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 10

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 10

Eberhart v. United States,
546 U.S. 12 (2005) 15, 18, 20

El Paso Nat. Gas Co. v. Neztsosie,
526 U.S. 473 (1999) 24

Foman v. Davis,
371 U.S. 178 (1962) 22, 35

Gilmore v. Palestinian Interim Self-Gov't Auth.,
843 F.3d 958 (D.C. Cir. 2016) 38

Gonzalez v. Thaler,
132 S. Ct. 641 (2012) 20

Greenlaw v. United States,
554 U.S. 237 (2008) 23

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,
303 F.2d 609 (7th Cir. 1962) 30, 31

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,
371 U.S. 215 (1962) ..... *passim*

Henderson v. Shinseki,
562 U.S. 428 (2011) 13

Holland v. Florida,
560 U.S. 631 (2010) 20, 36

In re Indu Craft, Inc.,
749 F.3d 107 (2d Cir. 2014) 15

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 36

Jennings v. Stephens,
135 S. Ct. 793 (2015) 23, 24, 25, 26

Khan v. U.S. Dep't of Justice,
494 F.3d 255 (2d Cir. 2007) 33

Kontrick v. Ryan,
540 U.S. 443 (2004) ..... *passim*

Life Techs. Corp. v. Promega Corp.,
137 S. Ct. 734 (2017) 11

Manrique v. United States,
137 S. Ct. 1266 (2017) 20, 23

Mobley v. C.I.A.,
806 F.3d 568 (D.C. Cir. 2015) 21, 32

Nat'l Hockey League v. Metro. Hockey Club, Inc.,
427 U.S. 639 (1976) 41

Osterneck v. Ernst & Whinney,
489 U.S. 169 (1989) 32, 43

Owen Equip. & Erection Co. v. Kroger,
437 U.S. 365 (1978) 14

Pierce Cty. v. Guillen,
537 U.S. 129 (2003) 12

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,
507 U.S. 380 (1993) 38

Puckett v. United States,
556 U.S. 129 (2009) 21

Rotella v. Wood,
528 U.S. 549 (2000) 37

Schacht v. United States,
398 U.S. 58 (1970) 15, 34, 35, 39

Sebelius v. Auburn Reg'l Med. Ctr.,
133 S. Ct. 817 (2013) 13

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941) 15

Singleton v. Wulff,
428 U.S. 106 (1976) 21

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,
357 U.S. 197 (1958) 41

State Farm Fire & Cas. Co. v. United States ex rel. Rigsby,
137 S. Ct. 436 (2016) 39

Stone v. INS,
514 U.S. 386 (1995) 12

Surowitz v. Hilton Hotels Corp.,
383 U.S. 363 (1966) 22, 35

Thompson v. INS,
375 U.S. 384 (1964) 31, 32, 33, 43

United States v. Am. Ry. Express Co.,
265 U.S. 425 (1924) 23

United States v. Burch,
781 F.3d 342 (6th Cir. 2015) 24, 25, 26

United States v. Garduño,
506 F.3d 1287 (10th Cir. 2007) 18

United States v. Madrid,
633 F.3d 1222 (10th Cir. 2011) 25

United States v. Olano,
507 U.S. 725 (1993) 20

United States v. Reyes-Santiago,
804 F.3d 453 (1st Cir. 2015) 18

United States v. Watson,
623 F.3d 542 (8th Cir. 2010) 18

United States v. Wong,
135 S. Ct. 1625 (2015) 13

Wolfsohn v. Hankin,
376 U.S. 203 (1964) 32

Youkelsone v. Fed. Deposit Ins. Corp.,
660 F.3d 473 (D.C. Cir. 2011) 9, 17, 20

Young v. United States,
535 U.S. 43 (2002) 36

CONSTITUTION

U.S. Const. art. III, § 1 14

STATUTES, RULES, AND PUBLIC LAWS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 13

28 U.S.C. § 1331 2

28 U.S.C. § 2072(a) 14

28 U.S.C. § 2101(c) 1

28 U.S.C. § 2107 ..... *passim*

28 U.S.C. § 2107(a) 26

28 U.S.C. § 2107(b) 11

28 U.S.C. § 2107(c) ..... *passim*

28 U.S.C. § 2107, ¶ 4 (1988) 12

28 U.S.C. § 2111 40

29 U.S.C. § 621 *et seq.* 2

29 U.S.C. § 626(b) 2

42 U.S.C. § 2000e *et seq.* 2

42 U.S.C. § 2000e-5(f)(3) 2

Fed. R. App. P. 4 34

Fed. R. App. P. 4(a) 1, 26

Fed. R. App. P. 4(a)(1)(A) 2, 3, 26

Fed. R. App. P. 4(a)(3) 26

Fed. R. App. P. 4(a)(5)(A)(ii) 38

Fed. R. App. P. 4(a)(5)(C) . . . . . *passim*

Fed. R. App. P. 4(a)(6) 16

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Sup. Ct. R. 13.1 1

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OPINIONS BELOW

The decision of the Seventh Circuit (Pet. App. 1-4) is reported at 835 F.3d 761 (7th Cir. 2016). The district court's summary-judgment decision (Pet. App. 7-47) is reported at 2015 WL 5439362 (N.D. Ill. Sept. 10, 2015). The district court's entry of judgment is found at Pet. App. 48-49. The district court's order extending Ms. Hamer's time to file a notice of appeal is found at Pet. App. 60.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 31, 2016. Pet. App. 5-6. No petition for rehearing was filed. Ms. Hamer's petition for a writ of certiorari was timely because it was filed on November 15, 2016—within ninety days of the Seventh Circuit's entry of judgment. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. On February 27, 2017, this Court granted Ms. Hamer's petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The current version of 28 U.S.C. § 2107, as well as Federal Rule of Appellate Procedure 4(a),[1] are reproduced at Pet. App. 50-56. The 1988 version of 28 U.S.C. § 2107 is reproduced at Stat. App. 1a. The 1991 amendments to 28 U.S.C. § 2107 are reproduced at

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[1] The appendix to the petition for a writ of certiorari contains the version of Federal Rule of Appellate Procedure 4(a) that was in effect until December 1, 2016. The December 1, 2016 amendments to the Federal Rules of Appellate Procedure make no change to Rule 4(a)(5)(C)—the provision at issue in this case.

Stat. App. 2a-3a. Pertinent portions of the House Report concerning the 1991 amendments to 28 U.S.C. § 2107 are reproduced at Stat. App. 4a-15a. The 2009 amendment to 28 U.S.C. § 2107 is reproduced at Stat. App. 16a-17a. The 2011 amendments to 28 U.S.C. § 2107 are reproduced at Stat. App. 18a-21a.

STATEMENT OF THE CASE

I. Proceedings in the District Court

In 2012, after Ms. Hamer was terminated from her position as Intake Specialist for the Neighborhood Housing Services of Chicago and Fannie Mae's Mortgage Help Center (together "Respondents"), Ms. Hamer filed suit in the United States District Court for the Northern District of Illinois against Respondents for violating the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Pet. App. 1-2; Pet. App. 7; Pet. App. 22. The district court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 626(b), and 42 U.S.C. § 2000e-5(f)(3).

On September 10, 2015, the district court granted summary judgment in favor of Respondents and directed the entry of judgment accordingly. Pet. App. 7-47. Final judgment was entered on September 14, 2015.[2] Pet. App. 48-49. Accordingly, in the absence of

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[2] Although the district court's summary-judgment decision and final judgment are dated September 10, 2015, neither was entered in the district court's docket until September 14, 2015. Pet. App. 7; Pet. App. 48. Therefore, the due date for filing a notice of appeal is calculated from September 14, 2015, the day that the judgment was entered. Fed. R. App. P. 4(a)(1)(A); *see also* Fed. R. Civ.

an extension of time, a notice of appeal was due by October 14, 2015. Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from").

After judgment was entered, Ms. Hamer and her court-appointed counsel disagreed on an appellate strategy. Therefore, on October 8, 2015—before the deadline to file a notice of appeal—Ms. Hamer's counsel filed and served on all parties a motion seeking: (i) to withdraw as counsel, and (ii) an extension of time until December 14, 2015 for Ms. Hamer to file a notice of appeal. Pet. App. 57-59. In seeking the extension of time, Ms. Hamer's counsel relied on 28 U.S.C. § 2107(c), which permits a district court, "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, [to] extend the time for appeal upon a showing of excusable neglect or good cause." Pet. App. 51; Pet. App. 57-58. In this motion, Ms. Hamer's counsel explained that Ms. Hamer needed additional time to secure appellate counsel and to determine an appropriate appellate strategy. Pet. App. 58. The district court granted the motion that same day,[3] permitting Ms. Hamer's counsel to withdraw and expressly stating that "[t]he Court will give [Ms. Hamer] until December 14, 2015 to file a Notice of Appeal." Pet. App. 60. From then on, Ms. Hamer proceeded *pro se* in the district court, as she was unable to retain appellate counsel that she could

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P. 58(c)(2)(A) (providing that a judgment is deemed entered when a judgment, set out in a separate document, is entered in the civil docket under Federal Rule of Civil Procedure 79(a)).

[3] This order was entered in the docket on October 9, 2015.

afford. Respondents did not challenge the extension of time that the district court granted. In particular, Respondents neither: (i) argued to the district court that an extension of time until December 14, 2015 violated Rule 4(a)(5)(C), nor (ii) filed a notice of appeal to challenge the length of the extension of time that the district court granted.

On December 11, 2015—within the time set by the district court—Ms. Hamer filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. Pet. App. 61. Respondents did not file a notice of cross-appeal to challenge the length of the extension of time that the district court granted.

II. Proceedings in the Seventh Circuit

Ms. Hamer proceeded *pro se* throughout her appeal before the Seventh Circuit. After the docketing of Ms. Hamer's appeal, Respondents submitted a Joint Corrected Docketing Statement in which Respondents noted, among other things, that "[o]n December 11, 2015, [Ms. Hamer] timely filed a Notice of Appeal[.]" Pet. App. 64; *see also* Pet. App. 63 ("The . . . Seventh Circuit has jurisdiction over this appeal . . . in that on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal[.]"). Nevertheless, the Seventh Circuit *sua sponte* requested that Respondents file a memorandum addressing the timeliness of Ms. Hamer's appeal. Pet. App. 66-67. Specifically, the Seventh Circuit requested that Respondents address whether Federal Rule of Appellate Procedure 4(a)(5)(C) precluded consideration of Ms. Hamer's appeal, and stated that "the time to appeal expired on October 14, 2015, permitting the district court to extend the time to appeal until November 13, 2015, but no later." Pet. App. 67. In

response to the Seventh Circuit's order, Respondents—although seeking dismissal on nonjurisdictional grounds—admitted that Rule 4(a)(5)(C) cannot divest the Seventh Circuit of jurisdiction because this Rule does not derive from a statute. Pet. App. 71-77. After Ms. Hamer responded to Respondents' memorandum, the Seventh Circuit deferred consideration of the issue until after merits briefing. Pet. App. 91-93.

After merits briefing and oral argument, the Seventh Circuit held—contrary to the arguments of all parties—that the timing of Ms. Hamer's notice of appeal divested the Seventh Circuit of jurisdiction to hear the case.[4] Pet. App. 1-4. Relying on this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the Seventh Circuit concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) "limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days [from the original deadline to file a notice of appeal]," and that "[a]lthough . . . Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal, this Court simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements." Pet. App. 4. Because the Seventh Circuit concluded that it lacked jurisdiction, it

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[4] The Seventh Circuit's decision incorrectly states that Respondents had "argu[ed] . . . that [the Seventh Circuit] lacks jurisdiction over [Ms. Hamer's] appeal." Pet. App. 2. To the contrary, Respondents, while seeking dismissal on nonjurisdictional grounds, argued extensively that noncompliance with Rule 4(a)(5)(C) could not deprive the Seventh Circuit of jurisdiction over the appeal. Pet. App. 71-77.

never reached the merits of Ms. Hamer's appeal. Moreover, due to this jurisdictional determination, the Seventh Circuit concluded that forfeiture and waiver could not excuse noncompliance with Rule 4(a)(5)(C), and that equitable considerations could not play any part of the analysis. Pet. App. 4.

SUMMARY OF THE ARGUMENT

This Court's precedents—as well as the text and history of 28 U.S.C. § 2107(c)—demonstrate conclusively that Federal Rule of Appellate Procedure 4(a)(5)(C) does not contain a jurisdictional timing requirement. This Court has long held that court-promulgated rules that do not derive from a statute cannot constitute a limitation on a court's jurisdiction. Here, not only does the requirement set forth in Rule 4(a)(5)(C) lack a statutory basis, but the 1991 amendments to § 2107 specifically repealed the provision that provided a maximum extension of time that a district court could grant for a party to file a notice of appeal. Since then, no federal statute has set a maximum amount of time that a district court may grant for a party to appeal, so long as a motion for an extension of time to appeal is filed no later than 30 days after the expiration of the original time to appeal. Accordingly, Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, and the Seventh Circuit erred in concluding that it lacked jurisdiction over the appeal. The Seventh Circuit's judgment should therefore be reversed.

Because Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, the Rule can be forfeited or waived by an appellee. This Court has long recognized that a party may forfeit the right to rely on a

nonjurisdictional claim-processing rule if that party waits too long to bring a violation of the rule to a court's attention. This Court has also recognized that a party may waive the right to invoke a nonjurisdictional claim-processing rule. For several reasons, Respondents here forfeited and waived their right to seek dismissal of Ms. Hamer's appeal based on any violation of Rule 4(a)(5)(C).

First, Respondents committed forfeiture by failing to raise the issue to the district court. Had Respondents objected to the length of the extension, the district court could have considered whether to grant a shorter extension in view of Respondents' concerns. *Second*, Respondents forfeited their right to seek dismissal based on Rule 4(a)(5)(C) because they failed to notice an appeal or a cross-appeal from the district court's order that extended the time to appeal. This Court has long recognized that a party that is requesting an appellate court to: (i) enlarge the party's own rights under a district court's order or judgment, or (ii) diminish the rights of its adversary under the order or judgment, must notice an appeal or a cross-appeal from that order or judgment. Respondents did not do so at all—let alone within the timeframe provided by the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107. Therefore, Respondents forfeited their right to seek dismissal under Rule 4(a)(5)(C). *Third*, Respondents forfeited their right to seek dismissal under Rule 4(a)(5)(C) because they failed to identify any untimeliness issue in their Joint Corrected Docketing Statement, and instead ***twice stated that Ms. Hamer's appeal was timely***. Respondents' two statements concerning the timeliness of Ms. Hamer's

appeal also constitute an affirmative waiver of their right to seek dismissal under Rule 4(a)(5)(C).

For these reasons, Respondents both forfeited and waived their right to seek dismissal under Rule 4(a)(5)(C). These forfeitures and waivers—alone or in combination—warrant a remand to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

Additionally, equitable considerations such as the unique-circumstances doctrine can excuse the filing of a notice of appeal outside the time provided by Rule 4(a)(5)(C). On at least three occasions, this Court has excused the late filing of a notice of appeal where the appellant was misled by the district court into believing that the notice of appeal would be timely. Although this Court overruled those cases to the extent that they authorized an exception to a jurisdictional rule, the unique-circumstances doctrine still applies to nonjurisdictional rules. The unique-circumstances doctrine is consistent with this Court's precedents and federal statutes. The doctrine is also consistent with the Federal Rules, which encourage disposition of cases on the merits and strongly discourage summary dismissal of cases based upon good-faith procedural violations that cause no prejudice to any party.

In this case, it is undisputed that Ms. Hamer filed her notice of appeal in reliance on the district court's order that extended the time to appeal beyond the time permitted by Rule 4(a)(5)(C). Accordingly, the unique-circumstances doctrine should excuse any noncompliance with Rule 4(a)(5)(C), and the case should be remanded to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

ARGUMENT

I. Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule Because It Does Not Derive from a Statute

As explained in detail below, 28 U.S.C. § 2107 does not impose the 30-day time limitation set forth in Rule 4(a)(5)(C).[5] Nor does any other statute provide this limitation. Accordingly, Rule 4(a)(5)(C) is not a jurisdictional rule.

A. Rule 4(a)(5)(C) Has No Statutory Basis

Two courts of appeals have recognized that "[a]lthough the authority to extend the time available to file an appeal is codified at 28 U.S.C. § 2107, Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code." *Youkelsone v. Fed. Deposit Ins. Corp.*, 660 F.3d 473, 475 (D.C. Cir. 2011); *see also Abel v. Sullivan*, 326 F. App'x 431, 432 (9th Cir. 2009) (recognizing that "[Rule 4(a)(5)(C)]'s time limitation is not derived from statute"). These courts are correct. The statute provides that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the

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[5] Rule 4(a)(5)(C) sets a maximum extension of: (i) 30 days from the original time to appeal, or (ii) 14 days from the district court's entry of the order granting an extension of time, whichever is later. Because the district court's order extending the time to appeal was entered prior to the expiration of the original time to appeal (Pet. App. 60), the 30-day period applies here, and this brief therefore focuses on the 30-day period. The arguments in this brief, however, apply equally to the 14-day period, because that period—like the 30-day period—is nonstatutory.

time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). This provision sets no limit on the length of any extension, as long as the motion for an extension is timely filed.

As this Court has explained, "the starting point for [the analysis of a statute] is the statutory text." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). Where the language is unambiguous, "the 'judicial inquiry is complete.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The plain language of § 2107(c) is clear: The statute does not limit the length of any extension of time that a district court can give to file a notice of appeal, so long as: (i) the motion for an extension of time is filed no later than 30 days after the expiration of the time otherwise set for bringing an appeal, and (ii) the moving party demonstrates excusable neglect or good cause.

The structure and history of § 2107(c) further confirm that the statute should be interpreted according to its plain language. Notably, the second part of § 2107(c) demonstrates that where Congress intends to limit the amount of extra time that a court may grant a party to file a notice of appeal, Congress does so explicitly. Specifically, if more than 30 days have elapsed since the time to file a notice of appeal has expired and a party has failed to move for an extension of time, the statute provides one additional opportunity for a party to obtain extra time to appeal. In particular, if a party has not received proper notice of the district court's appealable judgment, the party may, within 180 days of the entry of judgment or within 14 days after receipt of notice (whichever is

earlier), move the district court to reopen the time for appeal. 28 U.S.C. § 2107(c). If the district court grants the motion, it may "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." *Id.*

The fact that Congress included a maximum period for a district court to reopen the time to appeal in lack-of-notice cases in the second part of § 2107(c) but omitted any such maximum period from the first part further demonstrates that the first part of § 2107(c) contains no maximum extension of time.[6] *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 741-42 (2017) (using a companion provision of a statute to interpret the meaning of another portion of the same statute). Moreover, Congress has paid close attention to the time provisions in § 2107(c), and amends them when it sees fit. Specifically, in 2009, despite changing a time limitation set forth in the second part of § 2107(c), Congress left the first part of § 2107(c) unchanged. Statutory Time-Period Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6, 123 Stat. 1607, 1608 (2009) (amending the second part of § 2107(c) to require the filing of a motion within 14 days of receipt of notice of the district court's judgment, rather than the former period of 7 days).[7]

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[6] All of § 2107(c) was enacted at the same time. Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991).

[7] Congress also amended 28 U.S.C. § 2107 in 2011 by making certain changes to § 2107(b). Appeal Time Clarification Act of 2011, Pub. L. No. 112-62, § 3, 125 Stat. 756, 757 (2011). This amendment, however, did not change § 2107(c). Since then, § 2107 has not been amended.

Finally, the fact that Congress expressly repealed such a limitation in 1991 bolsters the conclusion that § 2107(c) does not impose a maximum extension of time. Before 1991, § 2107 provided that "[t]he district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." 28 U.S.C. § 2107, ¶ 4 (1988). In 1991, however, Congress: (i) repealed this language by "striking the third and fourth paragraphs [of § 2107]" and, as relevant here, (ii) amended the statute by adding 28 U.S.C. § 2107(c), which provides that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991). The House Report explains that the amendment to the statute includes "strik[ing] two paragraphs that are no longer applicable." H.R. Rep. No. 102-322, 1991 U.S.C.C.A.N. 1303, 1309 (1991). Since 1991, the first part of § 2107(c) has not changed. This history further demonstrates that § 2107(c) does not impose any limit on the length of any extension of time. "[W]hen Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect." *Pierce Cty. v. Guillen*, 537 U.S. 129, 145 (2003) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)).

To determine whether a time limitation is jurisdictional, this Court "inquire[s] whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, . . . 'courts should treat

the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). Here, not only has Congress failed to state that the time limitation set forth in Rule 4(a)(5)(C) is jurisdictional in nature, but, as explained above, Congress long ago affirmatively removed this time limitation from 28 U.S.C. § 2107. Moreover, the statute that delimits the jurisdiction of the Seventh Circuit does not impose the time limitation set forth in Rule 4(a)(5)(C). *See* 28 U.S.C. § 1291 (providing, in relevant part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States," but not setting any timeframe in which to do so). Nor does any other statute impose the time limitation set forth in Rule 4(a)(5)(C). Accordingly, Rule 4(a)(5)(C) falls within the general rule that "most time bars are nonjurisdictional[,]" and is a "filing deadline[]" that is a "'quintessential claim-processing rule[]'" that "'seek[s] to promote the orderly progress of litigation,' but do[es] not deprive a court of authority to hear a case." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

In sum, Congress has not set any limitation on the length of extension that a district court can give—let alone a jurisdictional limitation.

B. Because Rule 4(a)(5)(C) Lacks a Statutory Basis, It Does Not Constitute a Limitation on a Court's Jurisdiction

Rule 4(a)(5)(C) is nonjurisdictional because it is not grounded in a statute. This Court has repeatedly clarified that nonstatutory deadlines that appear solely

in a court-promulgated rule cannot operate to deprive a court of jurisdiction. In *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court addressed whether a creditor's untimely objection to a debtor's discharge under the Federal Rules of Bankruptcy Procedure deprived a bankruptcy court of jurisdiction to adjudicate the creditor's objection. *Kontrick*, 540 U.S. at 446-47. The Court concluded that the late filing did not deprive the bankruptcy court of jurisdiction. *Id.* at 448-52. Important to the Court's analysis was the fact that "[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge." *Id.* at 448. In concluding that the nonstatutory time limit at issue was nonjurisdictional, the Court specified that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452 (citing U.S. Const. art. III, § 1). The Court therefore recognized that "[c]ourt-prescribed rules of practice and procedure for cases in the federal district courts and courts of appeals . . . do not create or withdraw federal jurisdiction." *Id.* at 453 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)) (internal quotation marks omitted); *accord* Fed. R. Civ. P. 82 (providing that "[the Federal Rules of Civil Procedure] do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts"); Fed. R. Bankr. P. 9030 (providing that "[the Federal Rules of Bankruptcy Procedure] shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein"). Congress permits courts to adopt rules of practice and procedure. *Kontrick*, 540 U.S. at 453; *see also* 28 U.S.C. § 2072(a) (providing that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district

courts . . . and courts of appeals"). However, such rules do not constitute a limitation on a court's jurisdiction. *Kontrick*, 540 U.S. at 453.

Since *Kontrick*, this Court has reaffirmed that nonstatutory deadlines are nonjurisdictional. In *Eberhart v. United States*, 546 U.S. 12 (2005), this Court summarily reversed the Seventh Circuit's conclusion that an untimely motion for a new trial under the Federal Rules of Criminal Procedure deprived the district court of jurisdiction over the motion. *Eberhart*, 546 U.S. at 16-20; *see also Bowles*, 551 U.S. at 210-11 (distinguishing between statutory and nonstatutory deadlines and confirming that nonstatutory court-promulgated rules are not jurisdictional); *Schacht v. United States*, 398 U.S. 58, 64 (1970) (providing that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"); *In re Indu Craft, Inc.*, 749 F.3d 107, 114 (2d Cir. 2014) (concluding, based on this Court's precedents, that nonstatutory time limitations set forth in the Federal Rules of Appellate Procedure are nonjurisdictional in nature).

Contrary to the Seventh Circuit's conclusion that *Bowles* requires Rule 4(a)(5)(C) to be ranked as a jurisdictional requirement (Pet. App. 3-4), *Bowles* actually demonstrates that Rule 4(a)(5)(C) is nonjurisdictional. There, the appellant ("Bowles") missed his deadline to file a notice of appeal, and did not recognize the error until approximately sixty days after the expiration of the time to file a notice of

appeal. *See Bowles*, 551 U.S. at 207. Because he had not timely filed a motion to extend the time to appeal, Bowles was unable to avail himself of the provision in the first part of 28 U.S.C. § 2107(c), which allows a district court to extend the time for appeal "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal." 28 U.S.C. § 2107(c). Instead, because no motion was filed within 30 days of the expiration of the time to bring an appeal, Bowles' only remedy lay in the second part of 28 U.S.C. § 2107(c), which permits the district court, under certain circumstances, to "reopen the time for appeal for a period of 14 days from the entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c). Despite the clear statutory mandate that a district court may only reopen the time to appeal for a period of 14 days under those circumstances, the district court "inexplicably gave Bowles 17 days . . . to file his notice of appeal." *Bowles*, 551 U.S. at 207. Bowles filed his notice of appeal within the time set by the district court, "but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c)." *Id.*

Although the Court in *Bowles* concluded that the Court of Appeals lacked jurisdiction over that appeal, critical to this Court's analysis was the fact that the 14-day time limit in Federal Rule of Appellate Procedure 4(a)(6) is also set forth in a statute. *See Bowles*, 551 U.S. at 210 (noting this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" and "recogniz[ing] the jurisdictional significance of the fact that a time limitation is set forth in a statute"). In no way did the Court address Federal Rule of Appellate Procedure 4(a)(5)(C), which does not derive from a statute. Indeed, the Court

distinguished the case from *Kontrick* because the time limitation at issue in *Kontrick*—although set forth in the Federal Rules of Bankruptcy Procedure—did not implicate a court's jurisdiction because it did not appear in a statute. *Bowles*, 551 U.S. at 210-11. The Court recognized that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction[.]" *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 452). Accordingly, the reasoning of *Bowles*—far from mandating a finding that Rule 4(a)(5)(C) is jurisdictional as the Seventh Circuit concluded—actually demonstrates that Rule 4(a)(5)(C) is nonjurisdictional.

Because nonstatutory deadlines do not implicate a court's jurisdiction, and because Rule 4(a)(5)(C) does not derive from a statute, this Court should adopt the reasoning of *Youkelsone* and *Abel* and conclude that Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule. *See Youkelsone*, 660 F.3d at 475-76 (concluding that Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, finding that the appellee forfeited the right to seek dismissal under Rule 4(a)(5)(C), and addressing the merits of the appeal); *Abel*, 326 F. App'x at 432 (concluding that Rule 4(a)(5)(C) is nonjurisdictional because it does not derive from a statute).

The nonjurisdictional nature of Rule 4(a)(5)(C) is further supported by the way that the courts of appeals, post-*Bowles*, have treated the deadlines to appeal in criminal cases. *See* Fed. R. App. P. 4(b)(1)(A) (setting a 14-day deadline for a criminal defendant to file a notice of appeal); Fed. R. App. P. 4(b)(4) (providing that "[u]pon a finding of excusable neglect or

good cause, the district court may . . . extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)"). These deadlines do not appear in a statute. For that reason, since *Bowles*, the courts of appeals have uniformly held that these deadlines are nonjurisdictional. *E.g., United States v. Reyes-Santiago*, 804 F.3d 453, 457-58 (1st Cir. 2015) (collecting cases and finding that the reasoning in *Bowles*, *Eberhart*, and *Kontrick* demonstrate that Rule 4(b) is nonjurisdictional because it is not set forth in a statute); *United States v. Watson*, 623 F.3d 542, 545-46 (8th Cir. 2010) (same); *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007) (holding that Rules 4(b)(1)(A) and 4(b)(4) are nonjurisdictional rules). These decisions properly apply this Court's precedents. Because Rule 4(a)(5)(C)—like Rules 4(b)(1)(A) and 4(b)(4)—is not grounded in a statute, this Court should find that Rule 4(a)(5)(C) is a nonjurisdictional rule.

C. Because Rule 4(a)(5)(C) Is Not a Jurisdictional Rule and Because Ms. Hamer's Appeal Was Statutorily Timely, the Seventh Circuit Erred in Concluding that It Lacked Jurisdiction Over Ms. Hamer's Appeal

As explained above, Ms. Hamer filed a motion to extend the time to appeal well within the timeframe required by 28 U.S.C. § 2107(c). Because the district court entered judgment on September 14, 2015, Ms. Hamer's original time to appeal would have expired on October 14, 2015, and any motion to extend the time to appeal was required to be filed by November 13, 2015. Ms. Hamer filed her motion for an extension of time on

October 8, 2015—long before the November 13 deadline. Consequently, the filing of Ms. Hamer's notice of appeal—within the time set by the district court—was fully compliant with § 2107(c). Accordingly, because: (i) Ms. Hamer's appeal was statutorily timely, and (ii) Rule 4(a)(5)(C) is not a jurisdictional rule, the Seventh Circuit had jurisdiction over Ms. Hamer's appeal. This Court should reverse the Seventh Circuit's judgment that dismissed Ms. Hamer's appeal for lack of jurisdiction.

II. Because Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule, an Appellee Can—as Respondents Did Here—Forfeit or Waive the Right to Seek Dismissal Under the Rule

Because Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, it may be forfeited or waived by an appellee. Moreover, because Respondents both forfeited and waived their right to rely on Rule 4(a)(5)(C), this Court should instruct the Seventh Circuit to consider Ms. Hamer's appeal on the merits.

A. As a Nonjurisdictional Claim-Processing Rule, Rule 4(a)(5)(C) Is Subject to Forfeiture and Waiver by an Appellee

This Court has recognized that nonjurisdictional claim-processing rules are subject to forfeiture and waiver.[8] In *Kontrick*, the Court explained that unlike

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[8] This Court has explained that "[a]lthough jurists often use the words interchangeably, 'forfeiture is the failure to make the timely assertion of a right[,]'" whereas "waiver is the 'intentional

a jurisdictional rule, a nonjurisdictional claim-processing rule, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456. The Court then ruled that because the debtor waited too long to argue—under nonjurisdictional claim-processing rules found in Federal Rules of Bankruptcy Procedure—that a creditor's objection to the debtor's discharge was untimely, the untimeliness issue had been forfeited. *Id.* at 458-60. Similarly, the Court in *Eberhart* concluded that the Government had waited too long to argue that a criminal defendant's motion for a new trial was untimely under nonjurisdictional claim-processing rules found in the Federal Rules of Criminal Procedure, and therefore found that the Government forfeited the untimeliness issue. *Eberhart*, 546 U.S. at 19-20; *see also Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017) (recognizing that claim-processing rules are subject to forfeiture); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (distinguishing jurisdictional rules from nonjurisdictional claim-processing rules on the ground that, among other things, subject-matter jurisdiction is not subject to waiver or forfeiture); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (recognizing that time-limitation periods are ordinarily "nonjurisdictional and thus subject to waiver and forfeiture") (internal quotation mark omitted). Rule 4(a)(5)(C) is therefore subject to forfeiture and waiver by an appellee. *Youkelsone*, 660 F.3d at 475-76

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relinquishment or abandonment of a known right.'" *Kontrick*, 540 U.S. at 458 n.13 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

(addressing the merits of an appeal after finding that the appellee forfeited the right to seek dismissal under Rule 4(a)(5)(C)); *see also Mobley v. C.I.A.*, 806 F.3d 568, 578 (D.C. Cir. 2015) (noting that because it is a claim-processing rule, "[o]bjections based on FRAP 4(a)(5)(C) therefore can be forfeited or waived").

B. Respondents' Forfeiture and Waiver Here Preclude Them from Seeking Dismissal Under Rule 4(a)(5)(C)

1. Respondents Forfeited Their Right to Rely on Rule 4(a)(5)(C) by Failing to Raise Any Objection to the District Court

Respondents forfeited their right to seek dismissal under Rule 4(a)(5)(C) when they failed to inform the district court of any objection to the extension of time. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (recognizing that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"). As this Court has noted in an analogous context, the limitation on an appellate court's authority to address evidentiary objections that were not raised to the district court at trial "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *Puckett v. United States*, 556 U.S. 129, 134 (2009).

Here, had Respondents objected to the district court's extension of time, the district court could have considered whether to grant a shorter extension of time in view of Respondents' concerns. Because Respondents did not object, they forfeited their right to

seek dismissal of the appeal based upon any violation of Rule 4(a)(5)(C). A finding of forfeiture here is consistent with the overarching goal that the Federal Rules facilitate a disposition of claims on the merits. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (recognizing that "[i]f rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits"); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (rejecting the notion that a defect in a notice of appeal was fatal to the appeal and concluding that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"); Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). A finding of forfeiture here would also incentivize putative appellees to bring any violation of Rule 4(a)(5)(C) to the district court's attention promptly.

Because Respondents did not argue to the district court that its extension was in violation of Rule 4(a)(5)(C), they forfeited their right to do so on appeal because they "wait[ed] too long to raise the point." *Kontrick*, 540 U.S. at 456.

2. Respondents Forfeited Their Right to Rely on Rule 4(a)(5)(C) by Failing to Notice an Appeal or a Cross-Appeal from the District Court's Extension of Time

This Court has recognized that "[t]o secure appellate review of a judgment or order, a party must file a notice of appeal from that judgment or order. Filing a notice of appeal transfers adjudicatory authority from the district court to the court of appeals." *Manrique*, 137 S. Ct. at 1271. As explained in detail below, a party seeking to challenge a district court's order extending the time to appeal must notice an appeal from that order. Because Respondents failed to notice an appeal at all from the district court's October 8, 2015 order granting Ms. Hamer an extension of time to appeal—let alone within the timeframe required under 28 U.S.C. § 2107 and the Federal Rules of Appellate Procedure—Respondents forfeited their right to seek dismissal of Ms. Hamer's appeal based upon any violation of Rule 4(a)(5)(C).

Although an appellee who does not take a cross-appeal is permitted to "urge in support of a [district court's] decree any matter appearing before the record," it is impermissible for "an appellee who does not cross-appeal [to] 'attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)); *see also Greenlaw v. United States*, 554 U.S. 237, 240, 244-46 (2008) (holding that a court of appeals may not increase a criminal defendant's sentence in the

absence of an appeal or cross-appeal by the Government and noting that "it takes a cross-appeal to justify a remedy in favor of an appellee"); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82 (1999) (concluding that a court of appeals may not reverse a preliminary injunction that has not been appealed by either party and recognizing that "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single [Supreme Court case] has ever recognized an exception to the rule").

At least two courts of appeals have concluded that, in order to seek review of a district court's order granting an extension of time to file a notice of appeal, a putative appellee must notice an appeal from the district court's order extending the time. *First*, in *Amatangelo v. Borough of Donora*, 212 F.3d 776 (3d Cir. 2000), the Third Circuit declined to disturb a district court's order granting an extension of time to appeal in a civil case "because the appellees did not appeal from the order granting the extension of time to appeal." *Amatangelo*, 212 F.3d at 780. *Second*, in *United States v. Burch*, 781 F.3d 342 (6th Cir. 2015), a post-*Jennings* case, the Sixth Circuit denied the Government's motion to dismiss a criminal defendant's appeal as untimely. The Sixth Circuit explained that the Government's motion to dismiss was "'attack[ing]' the district court's order [extending the time to appeal] as an abuse of discretion with a view to lessening Burch's rights—indeed his right to appeal at all." *Burch*, 781 F.3d at 344 (quoting *Jennings*, 135 S. Ct. at 798). Accordingly, the Sixth Circuit concluded that "[t]he government should have appealed from the district court's order if it thought the [district] court abused its discretion in granting Burch's motion for an

extension of time to file an appeal." *Burch*, 781 F.3d at 344. In so holding, the Sixth Circuit recognized that the Tenth Circuit came to the opposite conclusion in *United States v. Madrid*, 633 F.3d 1222 (10th Cir. 2011). *Burch*, 781 F.3d at 345. The Sixth Circuit, however, recognized that the Tenth Circuit's conclusion that no appeal or cross-appeal was required rested on a "misread[ing] [of] Supreme Court precedent in determining when an appellee must file an appeal or cross-appeal[]" and was inconsistent with *Jennings*, which "makes clear that a cross-appeal is required when an appellee attacks an order with a view toward 'enlarging his own rights thereunder *or* of lessening the rights of his adversary." *Burch*, 781 F.3d at 345 (quoting *Jennings*, 135 S. Ct. at 798).

Here, any attempt by Respondents to have Ms. Hamer's appeal dismissed based on Rule 4(a)(5)(C) would necessarily seek to lessen Ms. Hamer's rights. Because the district court granted Ms. Hamer an extension of time until December 14, 2015 to file her notice of appeal, dismissal under Rule 4(a)(5)(C) would require: (i) a conclusion that Ms. Hamer was not entitled to the requested extension of time, and (ii) a reversal of the district court's order. Such a reversal would clearly constitute a lessening of Ms. Hamer's rights. Additionally, any attempt by Respondents to seek dismissal under Rule 4(a)(5)(C) would constitute an attempt to enlarge Respondents' own rights. Such an attempt would not be an argument for affirmance of the district court's judgment, but instead would be an argument that the district court's judgment is not subject to appellate review at all. Because dismissal based on Rule 4(a)(5)(C) would both enlarge Respondents' rights and lessen Ms. Hamer's rights,

Respondents were required to notice either an appeal or a cross-appeal from the district court's extension of time in order to seek dismissal based on that Rule. *Jennings*, 135 S. Ct. at 798; *Burch*, 781 F.3d at 345. Because Respondents did not do so, they forfeited their right to seek dismissal under Rule 4(a)(5)(C).

In the case of an appeal, a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A); *see also* 28 U.S.C. § 2107(a) (providing that a notice of appeal must be filed "within thirty days after the entry of such judgment, order or decree"). Accordingly, if Respondents wanted to appeal (as opposed to cross-appeal) the district court's extension of time, Respondents were required to file a notice of appeal from the district court's order by November 9, 2015. Fed. R. App. P. 4(a)(1)(A)[9]; *see also* 28 U.S.C. § 2107(a). Respondents did not file a notice of appeal from the district court's order, and instead waited until January 8, 2016 to argue that Ms. Hamer's appeal should be dismissed for noncompliance with Rule 4(a)(5)(C). Pet. App. 68-86.

In the case of a cross-appeal, the Federal Rules of Appellate Procedure provide that "[i]f one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." Fed. R. App. P. 4(a)(3). Accordingly, because

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[9] The deadline to file a notice of appeal was November 9, 2015 because November 8, 2015 fell on a Sunday. Fed. R. App. P. 26(a)(1)(C).

Ms. Hamer filed her notice of appeal on December 11, 2015—within the period set by the district court and therefore timely under § 2107(c)—Respondents were required to file any notice of cross-appeal no later than December 28, 2015.[10] Respondents did not file a notice of appeal from the district court's order at all, and instead waited until January 8, 2016 to argue that Ms. Hamer's appeal should be dismissed for noncompliance with Rule 4(a)(5)(C). Pet. App. 68-86.

In sum, Respondents did not notice an appeal or a cross-appeal from the district court's October 8, 2015 order at all—and assuredly not within the timeframe provided by the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107. Instead, Respondents sought dismissal of the appeal only through briefing filed with the Seventh Circuit well after the expiration of the time to notice an appeal from the district court's order. Respondents therefore forfeited their right to seek dismissal of the appeal based on any noncompliance with Rule 4(a)(5)(C) because they "wait[ed] too long to raise the point." *Kontrick*, 540 U.S. at 456.

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[10] December 25, 2015—14 days after Ms. Hamer's notice of appeal—was a federal holiday, and December 26-27 fell on the weekend. Therefore, any notice of cross-appeal was due by December 28, 2015. Fed. R. App. P. 26(a)(1)(C).

3. By Affirmatively Stating to the Seventh Circuit that Ms. Hamer's Appeal Was Timely, Respondents Waived and Forfeited Their Right to Seek Dismissal Based on Rule 4(a)(5)(C)

As discussed above, Respondents stated to the Seventh Circuit, in their Joint Corrected Docketing Statement, that "on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal" (Pet. App. 63), and then reiterated on the next page that "[Ms. Hamer] timely filed a Notice of Appeal[]" (Pet. App. 64). Through these clear statements, Respondents committed both waiver and forfeiture.

First, Respondents' statements demonstrated unequivocally that they would not seek to challenge the timeliness of Ms. Hamer's appeal. Therefore, these statements constitute a waiver of Respondents' right to seek dismissal under Rule 4(a)(5)(C). Indeed, Respondents' Joint Corrected Docketing Statement specifically articulated: (i) the date on which the district court entered final judgment against Ms. Hamer, (ii) the date on which Ms. Hamer filed a motion to extend the deadline to appeal, (iii) the date on which the district court granted Ms. Hamer's motion to extend the deadline to appeal, (iv) the new deadline that the district court set for Ms. Hamer to file a notice of appeal, and (v) the date on which Ms. Hamer filed a notice of appeal. Pet. App. 63-64. Yet Respondents twice stated that Ms. Hamer's appeal was timely. Pet. App. 63-64. Accordingly, Respondents waived their right to seek dismissal of Ms. Hamer's appeal under Rule 4(a)(5)(C).

Second, Respondents' statements that the appeal was timely also constitute a forfeiture of their right to seek dismissal under Rule 4(a)(5)(C) because these statements demonstrate that Respondents did not promptly raise the issue with the Seventh Circuit. To the contrary, Respondents sought dismissal based on Rule 4(a)(5)(C) only after the Seventh Circuit inquired about the appeal's timeliness. Pet. App. 66-86. Respondents had ample opportunity to raise the timeliness issue in their Joint Corrected Docketing Statement, but did not do so until later. Respondents' failure to argue, in the Joint Corrected Docketing Statement, that the appeal was untimely further demonstrates that Respondents forfeited the right to seek dismissal of the appeal based on any violation of Rule 4(a)(5)(C).

III. As a Nonjurisdictional Claim-Processing Rule, Federal Rule of Appellate Procedure 4(a)(5)(C) Is Subject to Equitable Considerations Such as the Unique-Circumstances Doctrine

As one commentator noted, this Court recognizes the unique-circumstances doctrine as "an equitable basis upon which to reach the merits of an appeal" that, although untimely, should "be treated as timely because the appellant reasonably relied upon a district court's representation that the appeal period would be lengthier than it turned out to be." Philip A. Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 Tul. L. Rev. 693, 701 (2007). As explained below, recognition of the unique-circumstances doctrine to excuse a violation of Rule 4(a)(5)(C) is fully consistent

with: (i) this Court's case law, (ii) federal statutes, and (iii) the Federal Rules. This doctrine is squarely applicable to the facts of this case and excuses the timing of Ms. Hamer's notice of appeal. Accordingly, this Court should remand the case to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

A. Equitable Considerations Such as the Unique-Circumstances Doctrine Can Excuse Noncompliance with Rule 4(a)(5)(C)

1. This Court's Precedents Demonstrate that Equitable Considerations Can Excuse a Party Who Files a Belated Notice of Appeal in Reliance on a District Court's Order

This Court has recognized that a party should not be penalized for relying on a district court's erroneous extension of time to file a notice of appeal. The Court first recognized this in 1962, in the context of reviewing the Seventh Circuit's dismissal of an appeal. As they existed at that time, the Federal Rules and a federal statute permitted an extension of time to appeal only if a party: (i) had not received notice of the district court's judgment, and (ii) demonstrated excusable neglect.[11] *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609, 611 (7th Cir. 1962). Nevertheless, upon motion filed before the expiration of the original time to appeal, the district court granted

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[11] As discussed in detail above, these provisions have since been amended.

an extension of time to appeal because the plaintiff's co-counsel had gone on vacation, even though the plaintiff's attorney of record had already received notice of the district court's adverse judgment. *Id.* at 610-11. In reliance on the district court's extension of time, the plaintiff filed its notice of appeal outside the initial 30-day period to appeal but within the time set by the district court. *Id.* The Seventh Circuit, however, concluded that because the plaintiff had received notice of the district court's judgment, the district court was not authorized to extend the time to appeal. *Id.* at 611-12. The Seventh Circuit therefore dismissed the appeal. *Id.* at 612. This Court reversed. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) ("*Harris Truck Lines II*"). In reversing, this Court recognized "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding," admonished the courts of appeals to "give[] great deference" to a district court's extension of time to appeal, and concluded that "the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the [district court's] ruling." *Harris Truck Lines II*, 371 U.S. at 217.

In *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964), this Court extended the reasoning set forth in *Harris Truck Lines II*. In *Thompson*, although the party's motion for a new trial was belatedly filed, the district court assured him that the motion was filed "in ample time." *Thompson*, 375 U.S. at 386. The party filed a notice of appeal within 60 days of the district court's disposition of the motion

for a new trial, but not within 60 days of the original judgment. *Id.* at 384-86. Had the motion actually been filed "in ample time," the time to file a notice of appeal would not have begun to run until the district court disposed of the motion. *Id.* at 385-86. However, because the motion was untimely, the filing of the motion did not toll the time to appeal. *Id.* The Seventh Circuit therefore dismissed the appeal as untimely. *Id.* at 387. This Court reversed in view of the "unique circumstances" and directed the Seventh Circuit to consider the appeal on the merits. *Id.*; *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989) (explaining that *Thompson* excuses a tardy notice of appeal "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that [the] act has been properly done"); *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (summarily reversing the dismissal of an appeal, based upon the reasoning in *Harris Truck Lines II* and *Thompson*).

Although this Court in *Bowles* overruled *Harris Truck Lines II* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule," *Bowles* did not overrule these cases as applied to nonjurisdictional rules. *Bowles*, 551 U.S. at 214; *see also Mobley*, 806 F.3d at 577 (citations omitted). Indeed, the D.C. Circuit recently applied the unique-circumstances doctrine to excuse the filing of an untimely post-judgment motion. *Mobley*, 806 F.3d at 577-78. In particular, it concluded that the appellant's untimely motion under Federal Rule of Civil Procedure 59(e) was caused by the district court's erroneous assurances regarding the deadline for that motion. *Id.*

Accordingly, the D.C. Circuit applied the unique-circumstances doctrine to conclude that the Rule 59(e) motion was to be deemed timely, and that the motion therefore tolled the time to file a notice of appeal. *Id.*; *see also Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258-60 (2d Cir. 2007) (concluding that *Bowles* did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. 2017) (noting that the unique-circumstances doctrine may be used to excuse noncompliance with nonjurisdictional rules). Application of the unique-circumstances doctrine to nonjurisdictional deadlines is fully consistent with this Court's precedents. *See Carlisle v. United States*, 517 U.S. 416, 436 (1996) (Ginsburg, J., concurring) (quoting 4A Wright & Miller, *Federal Practice & Procedure* § 1168, at 501) (noting that this Court's decisions in *Thompson* and *Harris Truck Lines II* are "based on a theory similar to estoppel").

The reasoning of *Harris Truck Lines II* directly applies to Rule 4(a)(5)(C). *Harris Truck Lines II* involved former Federal Rule of Civil Procedure 73(a), which provided that "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3062 (2d ed.

2017) (quoting Fed. R. Civ. P. 73(a) (1949)).[12] Although former Federal Rule of Civil Procedure 73(a) stated that an extension of time was only available where the party has not learned of entry of the judgment, *Harris Truck Lines II* recognized that a party that has relied, in good faith, on a district court's erroneous extension of time should not be penalized by suffering a dismissal of the appeal. Similarly here, although Rule 4(a)(5)(C) sets forth a maximum length of time for an extension, there is no reason to penalize a party that has relied in good faith on a district court's extension of time beyond that set by the Rule.

This Court's decision in *Schacht* is also instructive. In that criminal case, the petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. *Schacht*, 398 U.S. at 63. Rejecting the Government's view, this Court explained that the time period to file a petition for a writ of certiorari in a

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[12] Former Federal Rule of Civil Procedure 73 is closely related to Federal Rule of Appellate Procedure 4. Specifically, when the Federal Rules of Appellate Procedure went into effect in 1968, original Rule 4(a) adopted the timing provisions that then existed in Federal Rule of Civil Procedure 73. 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950 (4th ed. 2017). In 1979, Rule 4(a) was amended to permit an extension of time to appeal upon a showing of excusable neglect or good cause, with the maximum extension being the later of: (i) 30 days from the original deadline to appeal, or (ii) 10 days from the order granting the extension. *Id.* The 1979 amendment tracks what is currently Rule 4(a)(5)(C), except that in 2009, the 10-day period was changed to a 14-day period. *Id.*

criminal case is not a jurisdictional rule, and that the Rule "contains no language that calls for so harsh an interpretation." *Id.* at 63-64. Rather, the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64.

In addition to being consistent with this Court's case law, recognition of equitable exceptions to Rule 4(a)(5)(C) is good policy. District courts are not likely to extend the time beyond what is allowed by Rule 4(a)(5)(C) very often. And it is likely to be even more infrequent that a district court grants such an extension without objection from the opposing parties. When the district court does grant such an extension in the absence of an objection from the opposing parties, it would be unjust to adopt a rule that automatically requires dismissal of the appeal.

This Court's precedents demonstrate that the Federal Rules should be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules should generally not be construed to require "summary dismissals," and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Surowitz*, 383 U.S. at 373; *see also Foman*, 371 U.S. at 181 (1962) (rejecting the notion that a defect in a notice of appeal was fatal to the appeal and concluding that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"); Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered,

and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). Based on this Court's precedents, Rule 4(a)(5)(C) should be construed to be subject to equitable considerations.

2. Recognition of Equitable Considerations with Respect to Rule 4(a)(5)(C) Is Consistent with This Court's Treatment of Nonjurisdictional Deadlines and 28 U.S.C. § 2107(c)

a. Recognition of Equitable Exceptions Is Consistent with This Court's Treatment of Nonjurisdictional Statutory Deadlines

Recognition of equitable exceptions is also consistent with this Court's treatment of nonjurisdictional statutory deadlines. This Court has long held that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 560 U.S. at 645-46 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). This Court has also recognized that "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling . . . unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted).

Rule 4(a)(5)(C) should be subject to equitable considerations for the same reasons that federal statutes of limitations are generally subject to such

considerations. "[T]he basic policies of all limitation provisions" are "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 550 (2000). As this Court once explained, tolling was applicable to a time limitation where "[r]espondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429-30 (1965); *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (recognizing that nonjurisdictional time limitations "may be waived or mitigated in exercising reasonable equitable discretion[]"); *Carlisle*, 517 U.S. at 435 (Ginsburg, J., concurring) (recognizing, in the context of the Federal Rules of Criminal Procedure, that such rules should be treated like "[t]ime requirements in lawsuits," which "are customarily subject to 'equitable tolling'") (alteration in original) (citation omitted).

Because Rule 4(a)(5)(C) imposes a maximum extension of time that a district court may grant, equitable considerations will only arise where a district court has granted an extension of time beyond what is permitted by the Rule. In such a case, a putative appellee will not be relying on any policy of "repose, elimination of stale claims, [or] certainty about a plaintiff's opportunity for recovery [or] a defendant's potential liabilities" (*Rotella*, 528 U.S. at 550) because the appellee will be on notice that the time to appeal has been extended. Therefore, the appellee will not be surprised when a notice of appeal is filed within the time set by the district court.

b. Recognition of Equitable Considerations Is Consistent with 28 U.S.C. § 2107(c)

Recognition of equitable exceptions to Rule 4(a)(5)(C) is also consistent with the text of 28 U.S.C. § 2107(c), which allows extensions of time upon a showing of "excusable neglect or good cause." 28 U.S.C. § 2107(c); *see also* Fed. R. App. P. 4(a)(5)(A)(ii). "Excusable neglect" and "good cause" are both equitable concepts. As one commentator has noted, "Congress has . . . seen fit to empower judicial discretion in consideration of the equities in the deadline to file a civil notice of appeal" by way of 28 U.S.C. § 2107(c). Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619, 637 n.109 (2017). Additionally, this Court, in determining what constitutes "excusable neglect" under the Federal Rules of Bankruptcy Procedure, explained that "the determination [of excusable neglect] is at bottom an equitable one." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *see also Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 966 (D.C. Cir. 2016) (noting, in the context of Federal Rule of Civil Procedure 55(c), that "[t]he 'good cause' standard is designed to empower courts to consider the equities that specially arise in a given case"). Because Congress passed a statute allowing for extension of time to appeal that: (i) sets no maximum length for any extension of time, and (ii) specifically requires an analysis of equitable considerations, it would be incongruous—and inconsistent with the equitable nature of § 2107(c)—to interpret the time limitation in Rule 4(a)(5)(C) as insusceptible to equitable considerations.

3. Other Federal Rules and at Least One Other Federal Statute Confirm that the Unique-Circumstances Doctrine Can Excuse Noncompliance with Rule 4(a)(5)(C)

Recognizing equitable considerations with respect to Rule 4(a)(5)(C) is also consistent with the Federal Rules and federal law in general. When a Rule is to be interpreted as mandating an automatic disposition of a claim or defense without regard to the circumstances, it says so explicitly. *See* Fed. R. Civ. P. 12(h)(3) (providing that "[if] the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action) (emphasis added); Fed. R. Civ. P. 55(b)(1) (providing, under certain circumstances, that the clerk "must enter judgment" against a defaulting party); *see also* Fed. R. Civ. P. 12(h)(1) (providing that certain defenses are deemed waived if not presented within the prescribed timeframe). Rule 4(a)(5)(C) gives no indication that a district court's extension of time beyond the time period allowed by the Rule should result in automatic dismissal of the appeal, and therefore should not be so interpreted. *See Schacht*, 398 U.S. at 64 (noting that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"); *see also State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442-43 (2016) (concluding that the violation of a court's seal order under the False Claims Act does not automatically require dismissal of a case, in part because other provisions of the False Claims Act "do require, in express terms, the dismissal of a relator's action").

Recognition of equitable considerations with respect to Rule 4(a)(5)(C) is also consistent with other provisions that make clear that a district court's order should not be upset in the absence of harm to the parties. For example, 28 U.S.C. § 2111 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record *without regard to errors or defects which do not affect the substantial rights of the parties*." 28 U.S.C. § 2111 (emphasis added). Similarly, Federal Rule of Civil Procedure 61 provides that "[u]nless justice requires otherwise, no error . . . by the court or a party—is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order." Fed. R. Civ. P. 61. By the plain terms of Rule 4(a)(5)(C), a violation of the Rule can only occur when a district court extends the time to appeal beyond the time provided therein. Dismissal of an appeal that is filed: (i) within the time set by the district court, but (ii) outside the period permitted by Rule 4(a)(5)(C), would necessarily require a court of appeals to disturb the district court's extension of time. Where an appellant has relied in good faith on a district court's extension of time and there has been no prejudice to the appellee, it would run afoul of § 2111 and Rule 61 to require automatic dismissal of an appeal that is timely under § 2107 and the district court's order, but untimely under Rule 4(a)(5)(C). This further demonstrates that Rule 4(a)(5)(C) should be interpreted to permit equitable considerations.

Finally, recognition of equitable considerations with respect to Rule 4(a)(5)(C) is consistent with the fact that even willful violations of the Rules do not automatically lead to dismissal of a case. For example,

when a party files a frivolous paper with a district court or files a paper for an improper purpose, the party is subject to sanctions that "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). Additionally, a party who fails to obey a discovery order is subject to sanctions, but such sanctions do not automatically include dismissal of the case. Fed. R. Civ. P. 37(b)(2)(A); *see also Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (quoting *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958)) (noting that dispositive sanctions should not be imposed where the violation was "due to inability, and not to willfulness, bad faith, or any fault of petitioner"). Since even willful violations of the Rules do not mandate automatic dismissal, certainly an unintentional violation of Rule 4(a)(5)(C)—such as the one that occurred here—must be subject to equitable considerations.

In sum, the structure of the Federal Rules, as well as a statutory mandate that a district court's erroneous order should not be disturbed where there is no prejudice to the parties, support a construction of Rule 4(a)(5)(C) that gives courts recourse to equitable considerations.

B. The Unique-Circumstances Doctrine Precludes Dismissal of the Appeal Here

In view of the undisputed facts of this case, the unique-circumstances doctrine should excuse the timing of Ms. Hamer's notice of appeal. On October 8, 2015, Ms. Hamer's court-appointed counsel—in the

context of seeking to withdraw from the representation of Ms. Hamer—filed a motion to extend the time to appeal until December 14, 2015. Pet. App. 57-59. The district court then issued an order: (i) granting the motion to withdraw, and (ii) granting Ms. Hamer—who was rendered a *pro se* litigant by operation of the district court's order granting the motion to withdraw—an extension of time until December 14, 2015 to file a notice of appeal. Pet. App. 60. As the Seventh Circuit recognized (Pet. App. 4) and as Respondents have acknowledged (Opp. 4; [13] Pet. App. 69; Pet. App. 71), Ms. Hamer filed her notice of appeal on December 11, 2015 in reliance on the district court's order. Pet. App. 2; Pet. App. 4 (stating that "[the Seventh Circuit] recognize[s] that Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal"); Opp. 4 (noting Ms. Hamer's "apparent reliance" on the district court's order extending the time to appeal); Pet. App. 69 (same); Pet. App. 71 (same).

This situation is nearly identical to the facts of *Harris Truck Lines II*, discussed in detail above. Like the appellant in *Harris Truck Lines II*, Ms. Hamer diligently moved for an extension of time before the original deadline for filing a notice of appeal, and the district court granted the requested extension. Pet. App. 57-60. Because it is undisputed that Ms. Hamer relied on this order in filing her notice of appeal, the unique-circumstances doctrine excuses any noncompliance with the timing requirements set forth

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[13] "Opp." refers to the Brief for Respondents in Opposition.

in Rule 4(a)(5)(C). Moreover, the facts of this case fit the extension of the unique-circumstances doctrine set forth in *Thompson* and articulated by the Court in *Osterneck*. As the Court in *Osterneck* explained, the reasoning in *Thompson* applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that [the] act has been properly done." *Osterneck*, 489 U.S. at 179. Here, within the timeframe set by 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(5)(A), Ms. Hamer filed a motion for an extension of time to appeal, and was specifically assured by the district court that a notice of appeal would be timely if filed by December 14, 2015. Pet. App. 57-60. Accordingly, because Ms. Hamer appealed within the timeframe set by the district court, the timing of Ms. Hamer's notice of appeal not only fits within the unique-circumstances doctrine as set forth in *Harris Truck Lines II*, but also fits within the doctrine as expressed in *Osterneck* and *Thompson*.

CONCLUSION

The judgment of the Seventh Circuit should be reversed, and the case should be remanded to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

TABLE OF CONTENTS

28 U.S.C. § 2107 (1988) 1a

PL 102–198, December 9, 1991, 105 Stat 1623 . . . 2a

H.R. REP. 102-322, H.R. Rep. No. 322, 102ND Cong., 1ST Sess. 1991, 1991 WL 251360, 1991 U.S.C.C.A.N. 1303 (Leg.Hist.) 4a

PL 111-16, May 7, 2009, 123 Stat 1607 . . . . . 16a

PL 112-62, November 29, 2011, 125 Stat 756 . . . 18a

28 U.S.C. § 2107 (1988)
Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

(June 25, 1948, ch. 646, 62 Stat. 963; May 24, 1949, ch. 139, §§ 107, 108, 63 Stat. 104; Nov. 6, 1978, Pub. L. 95–598, title II, § 248, 92 Stat. 2672.)

PL 102–198, December 9, 1991, 105 Stat 1623

UNITED STATES PUBLIC LAWS
102nd Congress - First Session
Convening January 3, 1991

Additions and Deletions are not identified in this document.
8848

PL 102–198 (S 1284)
December 9, 1991
JUDICIAL IMPROVEMENTS

An Act to make certain technical corrections in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

<< 28 USCA § 2107 >>

SEC. 12. CONFORMITY WITH RULES OF APPELLATE PROCEDURE.

Section 2107 of title 28, United States Code, is amended—

(1) by designating the first and second paragraphs as subsections (a) and (b), respectively;
(2) by striking the third and fourth paragraphs;
(3) by designating the fifth paragraph as subsection (d); and
(4) by inserting after subsection (b), as so designated, the following:

"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

"(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

"(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.".

Approved December 9, 1991

PL 102–198, 1991 S 1284

H.R. REP. 102-322, H.R. Rep. No. 322, 102ND Cong., 1ST Sess. 1991, 1991 WL 251360, 1991 U.S.C.C.A.N. 1303 (Leg.Hist.)

****1303 P.L. 102-198, JUDICIAL IMPROVEMENTS**

***1 TECHNICAL AMENDMENTS TO LAWS RELATING TO THE COURTS**
DATES OF CONSIDERATION AND PASSAGE
Senate: June 12, November 22, 1991
House: November 19, 1991
House Report (Judiciary Committee) No. 102-322,
Nov. 18, 1991 (To accompany S 1274)
Cong. Record Vol. 137 (1991)

HOUSE REPORT NO. 102–322

November 18, 1991
[To accompany S. 1284]

The Committee on the Judiciary, to whom was referred the Act (S. 1284) to make certain technical corrections in the Judicial Improvements Act of 1990, having considered the same, report favorably thereon with amendments and recommend that the Act as amended do pass.

****0** The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

* * *

*4 SEC. 12. CONFORMITY WITH RULES OF APPELLATE PROCEDURE.

Section 2107 of title 28, United States Code, is amended–

(1) by designating the first and second paragraphs as subsections (a) and (b), respectively;

(2) by striking the third and fourth paragraphs;

(3) by designating the fifth paragraph as subsection (d); and

(4) by inserting after subsection (b), as so designated, the following:

"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds–

"(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

"(2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.".

Amend the title so as to read: "An Act to make certain technical corrections in the Judicial

Improvements Act of 1990 and other provisions of law relating to the courts".

EXPLANATION OF AMENDMENT

Inasmuch as S. 1284 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

PURPOSE OF THE LEGISLATION

The purpose of the bill, as amended, is to provide technical amendments to recently enacted court reform proposals–most notably the Judicial Improvements Act of 1990–and the Federal Rules of Civil and Appellate Procedure submitted to the Congress on May 1, 1991, by the Supreme Court of the United States.

HEARINGS

The Subcommittee on Intellectual Property and Judicial Administration, to which the bill was referred, held no hearings on the proposed legislation. During previous Congresses, numerous days of hearings were conducted on the underlying, substantive legislation.

**1304 COMMITTEE VOTE

On October 29, 1991, a reporting quorum being present, the Committee on the Judiciary ordered S. 1284 reported to the full House by voice vote, as amended.

DISCUSSION

I. LEGISLATIVE HISTORY

On June 12, 1991, S. 1284 was introduced by Senator Symms on behalf of Senators Heflin and Thurmond. The bill was immediately sent to the Senate desk and passed by unanimous consent. At the time of its Senate passage, the bill consisted of six titles.

On October 1, 1991, the Subcommittee on Intellectual Property and Judicial Administration considered S. 1284 and reported the bill favorably to the full Committee as an amendment in the nature of a substitute by voice vote, a quorum of Members being *5 present. The six titles of the Senate-passed bill were, in large part, approved. The Subcommittee added five further sections and modified the title of the bill.

On October 29, 1991, the full Committee marked up S. 1284 and, a quorum of Members being present, approved the amendment in the nature of a substitute and favorably reported the bill by voice vote, no objections being heard.

II. BACKGROUND

The background of this technical amendments legislation can best be discussed under three subject hearings: (1) The Judicial Improvements Act of 1990; (2) the Federal Rules of Civil and Appellate Procedure; and (3) recently enacted court reform legislation. Technical amendments are made in these three areas.

A. The Judicial Improvements Act of 1991[1] was a significant piece of court reform legislation. Passed by the 101st Congress and signed by President Bush on December 1, 1990, the multi-titled Act accomplished court reforms in four distinct areas; civil justice expense and delay reduction plans; creation of Federal judgeships; implementation of recommendations of the Federal Courts Study Committee; and judicial discipline and removal improvements.

Sections 1 through 9 of the proposed legislation provide technical amendments to the Judicial Improvements Act of 1990.

B. At its September 1990 session, the Judicial Conference of the United States voted to transmit to the Supreme Court certain changes to the Federal Rules of Civil Procedure, including modifications to Rule 4 relating to service of a summons. As explained in the letter of transmittal by the Chief Justice to the Congress, the Court decided not to proceed with the Rule 4 amendments as well as certain other amendments without further consideration by the Court.[2] In the process of deleting Rule 4 and related amendments from the package of Civil Rules amendments, the Court failed to properly draft the new package. Three mistakes were made. A technical amendment proposed to Rule 15(c)(3) was overlooked. In addition, as explained by the Director of

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[1] Pub. L. No. 101–650, 104 Stat. 5089 (Dec. 1, 1991).

[2] Amendments to the Federal Rules of Civil Procedure, Communication from the Chief Justice of the United States, 102d Cong., 1st Sess. (1991).

Administrative Office of the U.S. Courts, "*** two new forms I–A and I–B, to accompany **1305 the proposed changes to Rule 4 and to replace Form 19–A, were inadvertently transmitted by the Court."[3]

Section 11 of the proposed legsislation cures these errors.

Moreover, a fourth technical error arises from the proposed amendments to the Federal Rules of Appellate Procedure.[4] The amendments to Rule 4(a)(5), which relates to authorization for extension of time to file notices of appeal, create a conflict with the current statutory provisions found in section 2107 of title 28, United States Code. If the rule change take effect, without modifications to the statutory text, questions may arise about which of the different provisions is controlling. The result will breed mindless litigation. As aptly observed by the Chairman of the Standing *6 Committee on Rules of Practice and Procedure, the Honorable Robert E. Keeton, "doubts about the consistency of meaning of the statute and the rule could lead to wastefully expensive litigation and inadvertent loss of rights of appeal in a procedural snarl.***"[5] In the view of the Committee, this snarl can be avoided with the curative legislation found in section 12 of S. 1284, as amended.

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[3] See appendix 1.

[4] Amendments to the Federal Rules of Evidence, Communication from the Chief Justice of the United States, 102d Cong., 1st Sess. (1991).

[5] Letter to Hon. William J. Hughes from Hon. Robert E. Keeton (dated October 16, 1991).

The Committee is mindful of the fact that the various Rules Enabling Acts permit rules to supersede inconsistent procedural statutes previously enacted by the Congress. In 1988 the House of Representatives passed legislation proposed by this Committee to eliminate the supersession clauses, finding them to be unnecessary and of dubious constitutionality.[6] The Senate would not accept the proposal but a nonstatutory agreement was brokered by Chief Justice Rehnquist that allowed other needed reforms to be enacted into law.[7]

In a letter to the Honorable Peter W. Rodino, Jr., the Chief Justice reiterated that the judiciary did not object to repeal of the supersession clauses. However, if they remained in the statute books, the Chief Justice suggested that the judicial branch would not supersede statutes without giving Congress every opportunity to examine the proposals. Chief Justice Rehnquist observed:

> The Judicial Conference and its committees on rule have participated in the rules promulgation process for over a half century. During this time they have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter. The advisory committees should undertake to be circumspect in superseding procedural statutes.

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[6] See H. Rept. No. 100–889 (Part 1), 100th Cong., 2d Sess. (1988).

[7] See Pub. L. No. 101–650, 101st Cong., 2d Sess. (1990), 104 Stat. 5089.

> At the very least, we will undertake to identify such situations when they arise so that the Congress will have every opportunity to examine these instances on the merits as part of your review. This is generally the approach we have undertaken in the past and I assure you that it will continue to be the standard operating procedure **1306 of the Standing Committee on Rules of Practice and Procedure and its advisory committees on rules.[8]

The Committee has every expectation that the Chief Justice will remain true to his word.

* * *

Section 12. Conformity with Rules of Appellate Procedure

Due to recent changes in the Rules of Appellate Procedure, conforming amendments to section 2107 of title 28, United States Code, are necessary.

First, section 12 strikes two paragraphs that are no longer applicable.

Second, section 12 creates a new section 2107(c) of title 28, United States Code, to provide that a district court may, upon motion filed not later than thirty days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. Additionally, if the district court finds, first, that a

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[8] Letter from Hon. William H. Rehnquist to Hon. Peter W. Rodino, Jr. (dated Oct. 19, 1988), reprinted at 134 Cong. Rec. H 10441 (daily ed. Oct. 19, 1988).

party entitled to notice of the entry of a judgment or order did not receive such notice from the **1310 clerk or any party within twenty-one days of its entry, and, second, that no party would be prejudiced, then the court may reopen the time for appeal for a period of fourteen days from the date of entry of the order reopening the time for appeal. The court must act upon motion filed within one-hundred and eighty days after entry of the judgment or order or within seven days after receipt of notice of the entry of judgment or order, whichever is earlier.

The first sentence of new subsection (c) uses language almost identical to that in the first sentence of current Rule 4(a)(5), Federal Rules of Appellate Procedure. The remainder of the language is almost identical to that found in proposed Rule 4(a)(6), Federal Rules of Appellate Procedure, which is scheduled to become effective on December 1, 1991.

* * *

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill S. 1284, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

**1311 U.S. Congress,
Congressional Budget Office,
Washington, DC, November 6, 1991.

Hon. Jack Brooks,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1284, an act to make certain technical corrections in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts, as ordered reported by the House Committee on the Judiciary on October 29, 1991.

S. 1284 would make a number of technical and clarifying amendments to Public Law 101–650, the Judicial Improvements Act of 1990, and to the judicial code. The legislation also would make two technical amendments to proposed modifications to the Federal Rules of Civil Procedure. We estimate that no cost to the federal government or to state or local governments would result from enactment of this legislation. Enactment of S. 1284 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226–2860.

Sincerely,

Robert D. Reischauer,
Director.

* * *

PART V–PROCEDURE

* * * * * * *

CHAPTER 133–REVIEW
MISCELLANEOUS PROVISIONS

* * * * * * *

S 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

[In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

[The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.]

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for

appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds–

*17 (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

* * *

PL 111-16, May 7, 2009, 123 Stat 1607

UNITED STATES PUBLIC LAWS

111th Congress - First Session

Convening January 04, 2009

Additions and Deletions are not identified in this database. Vetoed provisions within tabular material are not displayed

PL 111-16 [HR 1626]
May 7, 2009
STATUTORY TIME-PERIODS TECHNICAL AMENDMENTS ACT OF 2009

An Act To make technical amendments to laws containing time periods affecting judicial proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

SEC. 6. AMENDMENTS RELATED TO TITLE 28, UNITED STATES CODE.

Title 28, United States Code, is amended–

* * *

<< 28 USCA § 2107 >>

(3) in section 2107(c), by striking "7 days" and inserting "14 days".

***1609**

* * *

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall take effect on December 1, 2009.

Approved May 7, 2009.

PL 112-62, November 29, 2011, 125 Stat 756

UNITED STATES PUBLIC LAWS

112th Congress - First Session

Convening January 04, 2011

Additions and Deletions are not identified in this database. Vetoed provisions within tabular material are not displayed Vetoes are indicated by Text ; stricken material by ~~Text~~ .

PL 112–62 [S 1637]
November 29, 2011
APPEAL TIME CLARIFICATION ACT OF 2011

An Act To clarify appeal time limits in civil actions to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

<< 28 USCA § 1 NOTE >>

This Act may be cited as the "Appeal Time Clarification Act of 2011".

<< 28 USCA § 2107 NOTE >>

SEC. 2. FINDINGS.

Congress finds that--

(1) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure provide that the time to appeal for most civil actions is 30 days, but that the appeal time for all parties is 60 days when the parties in the civil action include the United States, a United States officer, or a United States agency;

(2) the 60–day period should apply if one of the parties is--

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States;

(3) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure (as amended to take effect on December 1, 2011, in accordance with section 2074 of that title) should uniformly apply the 60–day period to those civil actions relating to a Federal officer or employee sued in an individual capacity for an act or omission occurring in connection with Federal duties;

(4) th. civil actions to which the 60–day periods should apply include all civil actions in which a legal officer of the United States represents the relevant officer or employee when the judgment or order is entered or in

which the United States files the appeal for that officer or employee; and

(5) the application of the 60–day period in section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure--

*757

(A) is not limited to civil actions in which representation of the United States is provided by the Department of Justice; and

(B) includes all civil actions in which the representation of the United States is provided by a Federal legal officer acting in an official capacity, such as civil actions in which a Member, officer, or employee of the Senate or the House of Representatives is represented by the Office of Senate Legal Counsel or the Office of General Counsel of the House of Representatives.

SEC. 3. TIME FOR APPEALS TO COURT OF APPEALS.

Section 2107 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

<< 28 USCA § 2107 >>

"(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

"(1) the United States;

"(2) a United States agency;

"(3) a United States officer or employee sued in an official capacity; or

"(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.".

<< 28 USCA § 2107 NOTE >>

SEC. 4. EFFECTIVE DATE.

The amendment made by this Act shall take effect on December 1, 2011.

Approved November 29, 2011.
LEGISLATIVE HISTORY--S. 1637 (H.R. 2633):

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No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER, PETITIONER

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO AND FANNIE MAE, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides that a notice of appeal in a civil case "must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Although the appellant may seek an extension of time, Rule 4(a)(5)(C) provides (in relevant part) that "[n]o extension * * * may exceed 30 days after the prescribed time." In this case, Petitioner's trial counsel sought and obtained a *60*-day extension, and Petitioner filed her appeal near the end of that period. The question presented is as follows:

Is a court of appeals barred from hearing an appeal filed after the 30-day extension period available under Rule 4(a)(5)(C), but within an extension of time granted by the district court, either because the 30-day limit on extensions is jurisdictional—as the Seventh Circuit correctly held in this case—or because it is a mandatory claim-processing rule not subject to equitable exceptions?

CORPORATE DISCLOSURE STATEMENT

Respondent Federal National Mortgage Association (Fannie Mae) is a private, federally chartered corporation. It does not have a parent corporation, and no publicly held company owns ten percent or more of its stock.

Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit corporation incorporated in Illinois. It does not have a parent corporation, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Given both its nature and its statutory basis, the 30-day limit in Rule 4(a)(5)(C) must be considered a jurisdictional rule. 7

A. Time limits for notices of appeal are quintessentially jurisdictional because they define when one court's power ends and another's begins. 8

B. Contrary to Petitioner's argument, the 30-day limit in Rule 4(a)(5)(C) *does* have a statutory basis 14

1. When Rule 4(a)(5)(C) was promulgated, the 30-day limit on extensions was an explicit statutory requirement. 15

2. Congress's 1991 amendment did not have the legal effect of eliminating the rule's jurisdictional force. 17

II. Even if the 30-day limit in Rule 4(a)(5)(C) is *not* jurisdictional, it must be enforced here 24

A. Rule 4(a)(5)(C) is mandatory and thus not subject to equitable exceptions. 25

B. Even if Rule 4(a)(5)(C) *were* subject to equitable exceptions, the unique circumstances doctrine would not apply here. 30

C. Respondents did not waive or forfeit their ability to invoke Rule 4(a)(C)(5) as a mandatory claim-processing rule. 32

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

CASES

Allender v. *Raytheon Aircraft Co.*,
439 F.3d 1236 (10th Cir. 2006) 32

Almendarez-Torres v. *United States*,
523 U.S. 224 (1998) 21

Bowles v. *Russell*,
551 U.S. 205 (2007) .....*passim*

Browder v. *Dir., Dep't. of Corr. of Ill.*,
434 U.S. 257 (1978) 11, 25, 27

Burwell v. *Hobby Lobby Stores, Inc.*,
134 S. Ct. 2751 (2014) 23

Cannon v. *Univ. of Chi.*,
441 U.S. 677 (1979) 21

Dir. of Revenue of Mo. v. *CoBank ACB*,
531 U.S. 316 (2001) 23

Eberhart v. *United States*,
546 U.S. 12 (2005) 10, 28

Gonzalez v. *Thaler*,
565 U.S. 134 (2012) 25

Greenlaw v. *United States*,
554 U.S. 237 (2008) 35

Griggs v. *Provident Consumer Disc. Co.*,
459 U.S. 56 (1982) 9, 10, 11, 25

Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) 30

Hollins v. *Dep't of Corr.*, 191 F.3d 1324 (11th Cir. 1999) 30

In re Home & Family, Inc., 85 F.3d 478 (10th Cir. 1996) 30

Houston v. *Lack*, 487 U.S. 266 (1988) 27

Jennings v. *Stephens*, 135 S. Ct. 793 (2015) 34, 35

Joshi v. *Ashcroft*, 389 F.3d 732 (7th Cir. 2004) 9, 13

Kontrick v. *Ryan*, 540 U.S. 443 (2004) ..... *passim*

Kraus v. *Consol. Rail Corp.*, 899 F.2d 1360 (3d Cir. 1990) 30

Manrique v. *United States*, 137 S. Ct. 1266 (2017) ..... *passim*

N. Pipeline Constr. Co. v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982) 16

Panhorst v. *United States*, 241 F.3d 367 (4th Cir. 2001) 31

Props. Unlimited Inc. Realtors v. *Cendant Mobility Servs.*, 384 F.3d 917 (7th Cir. 2004) 31

Schacht v. *United States*,
398 U.S. 58 (1970) 28

St. John's United Church of Christ v. *City of Chicago*, 401 F. Supp. 2d 887 (N.D. Ill. 2005), *aff'd*, 502 F.3d 616 (7th Cir. 2007) 37

Thompson v. *INS*,
375 U.S. 384 (1964) 27, 30

Torres v. *Oakland Scavenger Co.*,
487 U.S. 312 (1988) ..... *passim*

Trainmen v. *Balt. & Ohio R. Co.*,
331 U.S. 519 (1947) 21

Trepanier v. *City of Blue Island*,
364 F. App'x 260 (7th Cir. 2010) 33, 34

United States v. *Beggerly*,
524 U.S. 38 (1998) 26

United States v. *Brockamp*,
519 U.S. 347 (1997) 26

United States v. *Curry*,
47 U.S. (6 How.) 106 (1848) 14

United States v. *Madrid*,
633 F.3d 1222 (10th Cir. 2011) 35

United States v. *Olano*,
507 U.S. 725 (1993) 36

United States v. *Pogue*,
19 F.3d 663 (D.C. Cir. 1994) 37

United States v. *Robinson*,
361 U.S. 220 (1960) ..... *passim*

United States v. *Singletary*,
471 F.3d 193 (D.C. Cir. 2006) 33

Universal Camera Corp. v. *NLRB*,
340 U.S. 474 (1951) 35

Wolfsohn v. *Hankin*,
376 U.S. 203 (1964) 30

Yates v. *United States*,
135 S. Ct. 1074 (2015) 21

Young v. *United States*,
535 U.S. 43 (2002) 29

Zuni Pub. Sch. Dist. No. 89 v. *Dep't of Educ.*,
550 U.S. 81 (2007) 22, 23

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. art. III § 1 15

28 U.S.C. § 1291 36

28 U.S.C. § 2107 ..... *passim*

28 U.S.C. § 2111 29

Pub. L. No. 80-773 (June 25, 1948),
62 Stat. 963 ..... 15, 16, 17

Pub. L. No. 81-72 (May 24, 1949),
63 Stat. 104–05 16

Pub. L. No. 95-598 (Nov. 6, 1978),
92 Stat. 2672 16

Pub. L. No. 102-198 (Dec. 9, 1991),
105 Stat. 1267 ..... 18, 20

Pub. L. No. 102-198 (Dec. 9, 1991),
105 Stat. 1623 20

Rules Enabling Act, Pub. L. No. 73-415,
48 Stat. 1064 17

U.S. Code v.3 Titles 27–42 (1946) 17

U.S. Code v.12 Titles 27–29 (1988) 16

RULES

Fed. R. App. P. 3 ..... 12, 28

Fed. R. App. P. 3(a)(1) 28

Fed. R. App. P. 3(a)(2) 12, 13, 28

Fed. R. App. P. 3 adv. comm. notes 12

Fed. R. App. P. 4 ..... *passim*

Fed. R. App. P. 4(a) ..... *passim*

Fed. R. App. P. 4(a)(4) 11

Fed. R. App. P. 4(a)(5) 18, 19

Fed. R. App. P. 4(a)(5)(A)(ii) 26

Fed. R. App. P. 4(a)(5)(C) ..... *passim*

Fed. R. App. P. 4(a)(6) 4, 18, 19, 26

Fed. R. App. P. 4(b) 6, 25

Fed. R. App. P. 4 adv. comm. notes 19

Fed. R. App. P. 26(b) 10, 26

Fed. R. App. P. 26(b)(1) 10, 13

Fed. R. Civ. P. 73(a) 5, 17

Fed. R. Civ. P. 73 adv. comm. notes 27

Fed. R. Crim. P. 45(b) 10

1st Cir. R. 3.0(a) 37

4th Cir. R. 3(b) 37

7th Cir. R. 3(c)(1) 36, 37

7th Cir. R. 28(a) 37

N.D. Ill. Loc. R. 78.3 34

OTHER AUTHORITIES

H.R. Rep. No. 308, 80th Cong. (1947) 17

H.R. Rep. No. 322, 102d Cong. (1991) 20

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William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079 (2017) 21, 22

Moore's Fed. Practice § 304 App.01 (3d ed. 2016) 16

INTRODUCTION

For more than a century, American law has understood the rules surrounding notices of appeal to be "jurisdictional." As a result, they are not subject to waiver or forfeiture, and they do not allow equitable exceptions. Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure is just such a rule, providing (in relevant part) that no extension of the time for appeal may exceed 30 days from the original deadline.

In this case, Petitioner's counsel asked for—and received—an extension of time to appeal that was twice as long as the rule allows, and Petitioner waited until the end of that period to file her notice. This made the appeal untimely, so the Seventh Circuit dismissed it for lack of jurisdiction.

That result was correct—and is entirely consistent with this Court's cases. In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that a similar rule was "jurisdictional" because it had two characteristics. First, by its nature, the rule related to the movement of "adjudicatory authority" from one court to the next. And second, the rule had its roots in a statute enacted by Congress. Rule 4(a)(5)(C) shares both of these characteristics.

The crux of the disagreement between the parties has to do with the rule's statutory basis. In *Bowles*, the relevant time limit appeared both in Rule 4 and in 28 U.S.C. § 2107—the statute that corresponds to the rules relating to a timely notice of appeal. Here, while the 30-day limit appeared in § 2107 at the time of Rule 4(a)(5)(C)'s promulgation, that limit was omitted—without explanation, and probably inadvertently—from the replacement language inserted when Congress amended the statute in 1991. As discussed

below, however, there is no reason to interpret the 1991 amendment as stripping Rule 4(a)(5)(C) of its jurisdictional significance. The plain text of the amendment does not purport to make such a change, and Congress explained that it was passing the amendment merely to make technical corrections and to bring the statute into "conformity" with the rules.

Even if the rule were not jurisdictional, however, it is still mandatory and must be enforced. As this Court recognized just a few months ago in *Manrique* v. *United States*, 137 S. Ct. 1266 (2017), a mandatory claim-processing rule may not be set aside in the exercise of a court's discretion. *Id.* at 1274. Such a rule is not subject to harmless error analysis (*ibid.*), nor is it subject to equitable exceptions such as the "unique circumstances" doctrine (*infra* Part II.A). Thus, no matter how this Court resolves the jurisdictional question, the result would be the same: The 30-day limit on extensions for notices of appeal cannot be set aside based on considerations of equity, so it applies here and bars Petitioner's appeal. This Court may resolve this case either by answering the jurisdictional question itself, or—as in *Manrique*—by simply finding that the rule is mandatory and unalterable in any event.

STATEMENT

Respondent Federal National Mortgage Association (Fannie Mae) is a federally chartered corporation created to promote a vibrant secondary mortgage market and to make home ownership more accessible for low and middle-income Americans. Respondent Neighborhood Housing Services of Chicago (NHS) is a nonprofit neighborhood revitalization organization that creates opportunities for people to live in afford-

able homes. In partnership with NHS, Fannie Mae operated the Fannie Mae Mortgage Help Center in downtown Chicago.

Petitioner worked at the Center for several years. As the district court observed, however, her tenure was riddled with performance issues. Pet. App. 10–14. She applied for promotions but did not receive them, in light of these performance issues and the superior performance of the other candidates. *Id.* at 14–18. Ultimately, she was relieved of her duties and was offered a different position, which she declined. *Id.* at 20–22.

Petitioner filed a *pro se* complaint in the U.S. District Court for the Northern District of Illinois, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. At her request, the district court appointed counsel to represent her. A series of issues and conflicts led her first appointed counsel to withdraw—and the second, and the third—but each time, the district court promptly appointed new counsel so that Petitioner would be adequately represented. Pet. App. 22–23.

After the close of discovery, the district court granted summary judgment in Respondents' favor on all counts, entering final judgment on September 14, 2015. Petitioner's original deadline to file a notice of appeal was October 14, 2015.

Less than a week before the deadline to appeal—and without conferring in advance with Respondents—Petitioner's counsel filed a "Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal," asking the court to "extend the deadline to file

any Notice of Appeal to December 14, 2015, pursuant to 28 U.S.C. 2107(c), to allow time for Movants to withdraw and for new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." Pet. App. 58 ¶ 3. The district court granted the motion on the same day, without seeking or allowing time for a response by NHS or Fannie Mae. *Id.* at 60. Petitioner (then acting *pro se*) filed her notice of appeal on December 11, 2015—nearly three months after the entry of final judgment. *Id.* at 61.

When the case reached the Seventh Circuit, the court *sua sponte* asked Respondents to file a brief addressing the timeliness of the appeal. Relying on the current version of 28 U.S.C. § 2107(c) and Seventh Circuit authorities post-dating *Bowles*, Respondents' brief explained that "it appears to be the law in this Circuit" that the time limits in Rule 4(a)(5)(C) "are not jurisdictional." Pet. App. 77. Respondents also argued, however, that the 30-day limit is "mandatory, unless waived or forfeited," and not subject to equitable exceptions. *Id.* at 78.[1]

After merits briefing and oral argument, the Seventh Circuit took a different view than the parties and dismissed Petitioner's appeal for lack of jurisdiction, declining to reach any other issue. The court explained that "[l]ike Rule 4(a)(6) [at issue in *Bowles*], Rule 4(a)(5)(C) is the vehicle by which § 2107(c) is employed and it limits a district court's

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[1] In seeking a writ of certiorari, Petitioner acknowledged that Respondents remain "free to argue to this Court that a violation of Rule 4(a)(5)(C) deprives a court of appeals of jurisdiction." Reply Br. of Pet. at 2.

authority to extend the notice of appeal filing deadline to no more than an additional 30 days." Pet. App. 4. As a result, the court held that the rule is jurisdictional and that Petitioner's appeal could not proceed. *Ibid.* For the reasons set forth below, the Seventh Circuit's decision was entirely correct.

SUMMARY OF ARGUMENT

I. As this Court observed in *Bowles*, "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." 551 U.S. at 209 n.2. Such rules are jurisdictional because (1) by their nature, they prescribe the classes of cases falling within a court's adjudicatory authority; and (2) they have their roots in an act of Congress, which is the branch of government that the Constitution charges with setting the bounds of the federal courts' power.

Under this analysis, the 30-day limit in Rule 4(a)(5)(C) is just as "jurisdictional" as the other aspects of Rule 4. By its nature, the rule operates as a time limit on the filing of a notice of appeal—an event that is quintessentially jurisdictional, as it marks the point when a case moves from one tribunal to another. It also has a statutory basis and the necessary congressional authorization. When Rule 4(a)(5)(C) was promulgated, the 30-day time limit on extensions appeared expressly in 28 U.S.C. § 2107. Indeed, even the predecessor to Rule 4(a)(5)(C)—Federal Rule of Civil Procedure 73(a)—was codified by Congress almost immediately after its adoption.

To be sure, the reference to the 30-day limit on extensions fell out of the statute when it was amended in 1991—but there is no reason to interpret that

amendment as stripping Rule 4(a)(5)(C) of its jurisdictional significance. As Congress explained, the purpose behind the 1991 amendment was to make "technical corrections" and to bring the statute into "conformity with [the] rules of appellate procedure," which had changed in other respects since their original promulgation in 1967. Pet. App. 4a–5a. To accomplish these changes, Congress replaced the relevant paragraph in § 2107 with a more detailed provision relating to the process for applying for extensions of time to appeal—the topics addressed in the newer rules. In doing so, Congress omitted—without explanation, and probably inadvertently—any reference to the 30-day limit on the length of such extensions. In context, that amendment did not and cannot have the legal effect that Petitioner suggests.

II. At a minimum, Rule 4(a)(5)(C) is "a mandatory claim-processing rule" that is not subject to equitable exceptions. See *Manrique*, 137 S. Ct. at 1271 (holding that Rule 4(b)'s time limits on filing notices of appeal in criminal cases are mandatory). Indeed, in *Manrique*, this Court declined to resolve a question about whether an appeal-related rule was jurisdictional because—as here—the answer would not make any difference: Either way, the rule is mandatory and "unalterable." *Ibid.*

Further, even if Rule 4(a)(5)(C) were otherwise open to equitable exceptions, the "unique circumstances" doctrine would not apply. To the extent that doctrine still exists at all, its function is to provide relief to a litigant who reasonably relies on a mistake of the district court. Here, however, the mistake did not originate with the district court; it began with Petitioner's own counsel. Before withdrawing, Petition-

er's counsel asked for—and received—an extension that was twice as long as what the rules allow. The court granted the relief counsel had (improperly) requested. The "unique circumstances" doctrine does not enable a litigant to reverse the consequences of her own lawyer's mistake.

Finally, if the 30-day limit in Rule 4(a)(5)(C) is non-jurisdictional (and thus is subject to waiver and forfeiture), there has been no waiver or forfeiture here. Respondents briefed the mandatory nature of Rule 4(a)(5)(C) extensively in the Seventh Circuit before taking up the merits of the appeal, which is all the law requires to preserve the issue.

In her brief in this Court, Petitioner argues that several specific acts or omissions by Respondents constitute waiver and forfeiture—for example, their assertions about jurisdiction in non-binding docketing statements filed in the Seventh Circuit, and the fact that they did not object to or appeal the order granting the extension in the district court. None of these arguments appears in Petitioner's briefs in the Seventh Circuit, so they all should be disregarded. And in any event, those arguments are incorrect. Under the Seventh Circuit's rules and precedents, Respondents did all that was required to preserve this point, arguing expressly that the rule is mandatory even if not jurisdictional. Nothing more was required.

ARGUMENT

I. Given both its nature and its statutory basis, the 30-day limit in Rule 4(a)(5)(C) must be considered a jurisdictional rule.

Under this Court's cases, the classification of a rule as jurisdictional depends on both the *nature of*

and *basis for* the rule. The term "jurisdictional" refers to a rule that by its nature prescribes "the classes of cases * * * falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). Further, a jurisdictional rule must have its basis in an act of Congress, because it is Congress that "decides what cases the federal courts have jurisdiction to consider" and "can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212–13.

Rule 4(a)(5)(C) is jurisdictional in both respects. By their nature, rules relating to the timeliness of a notice of appeal determine whether power over a case has shifted from one court to another, and thus they are necessarily "prescriptions delineating the classes of cases * * * falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. Further, the 30-day time limit for extensions in Rule 4(a)(5)(C) was explicitly prescribed by statute and authorized by Congress. And while the congressional authorization is no longer expressly part of the statute, there is no reason to conclude that Congress intended the relevant amendment to strip the rule of its jurisdictional significance.

A. Time limits for notices of appeal are quintessentially jurisdictional because they define when one court's power ends and another's begins.

The essence of a "jurisdictional" rule is that it determines the power of the court over the case or person before it. As this Court explained in *Kontrick*, "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the clas-

ses of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S. at 455. As one court of appeals put it, "[t]he emergent distinction, so far as classification of deadlines as jurisdictional or not jurisdictional is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another, which are jurisdictional, and other deadlines, which are not." *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004).

Rules relating to the filing of an appeal are perhaps the clearest example. As this Court has explained, a timely notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); accord *Manrique*, 137 S. Ct. at 1271. By definition, rules relating to the filing and timeliness of a notice of appeal determine whether a case falls within a particular court's "adjudicatory authority." *Kontrick*, 540 U.S. at 455.

It is no surprise, then, that "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles*, 551 U.S. at 209 n.2. Indeed, many decades ago this Court observed that "[e]very * * * decision" it had found "holds that the filing of a notice of appeal" within the time provided under the relevant rules "is mandatory and jurisdictional." *United States* v. *Robinson*, 361 U.S. 220, 224 (1960). The Court in *Robinson* was interpreting the Federal Rules of Criminal Procedure, which generally permit enlargements of time if the movant can show excusable neglect. Tellingly, however, those rules specifically provide that such en-

largements are *not* available for "taking an appeal." *Ibid.* (quoting Fed. R. Crim. P. 45(b), now Fed. R. App. P. 26(b)). The rules governing civil cases reflect the same sorts of limitations. Fed. R. App. P. 26(b)(1) ("For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal.").

The Court's discussion of this issue in *Robinson* was consistent with the Court's treatment of the prior rules of court governing the taking of appeals, which were also considered jurisdictional. As the Court explained, Rule III of "[t]he first Criminal Appeals Rules" promulgated under the 1933 Rules Enabling Act "provided a 5-day time limit for the taking of an appeal from a judgment of conviction," and "[i]t was uniformly held that [the rule] was mandatory and jurisdictional, and appeals not taken within that time appear always to have been dismissed regardless of excuse." 361 U.S. at 226–27.

Although the Court has questioned some aspects of *Robinson* in recent years,[2] its decisions have still consistently recognized the basic proposition that appeal-related rules are jurisdictional. *See Bowles*, 551 U.S. at 209 n.2. The case of *Griggs* v. *Provident Consumer Discount Co.*, for example, concerned the por-

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[2] See, *e.g.*, *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (noting that "[t]he Seventh Circuit correctly identified our decisions in *Smith* and *Robinson* as the source of the confusion," but not overruling those cases); *Kontrick*, 540 U.S. at 454 (citing *Robinson* as an example of this Court being "less than meticulous" in its use of the term "jurisdictional").

tion of Rule 4 of the Federal Rules of Appellate Procedure relating to the impact of a motion to alter or amend the judgment still pending in the district court after the filing of a notice of appeal. 459 U.S. at 57. At the time, Federal Rule of Appellate Procedure 4(a)(4) provided that "[a] notice of appeal filed before the disposition of [such a motion] shall have no effect." *Ibid.* The Court explained that such a rule was jurisdictional because it determined when one court lost adjudicatory power and another gained it:

> Even before 1979, it was generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Id. at 58. "In short, [the filing of a premature notice] is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" *Id.* at 61 (quoting *Browder* v. *Dir., Dep't. of Corr. of Ill.*, 434 U.S. 257, 264 (1978)).

Similarly, in *Torres* v. *Oakland Scavenger Co.*, this Court held that the failure to list a party in a notice of appeal had jurisdictional implications. 487 U.S. 312, 314–15 (1988). As the Court explained, "the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not

named in the notice of appeal." *Id.* at 315. "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." *Ibid.* "Because the Rules do not grant courts the latter power, * * * the Rules likewise withhold the former." *Ibid.*

Torres also underscores the "weight" to be given to the Advisory Committee's understanding of Rule 4 as jurisdictional in nature. See 487 U.S. at 316 (Advisory Committee notes "'of weight' in [the Court's] construction of the Rule") (citation omitted). According to the Advisory Committee:

> Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," compliance with the provisions of those rules is of the utmost importance.

Fed. R. App. P. 3 adv. comm. notes to 1967 amendment (quoting *Robinson*, 361 U.S. at 224). Critically, "[t]his admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a single jurisdictional threshold." *Torres*, 487 U.S. at 315.

The relationships between Rule 4 and other rules further illustrate this point. Rule 3(a)(2) states that "[a]n appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect

the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." Fed. R. App. P. 3(a)(2) (emphasis added). The corollary, of course, is that the failure to make a "timely filing of a notice of appeal" *does* affect the validity of the appeal. And as previously noted, Rule 26(b)(1) declares that no extensions shall be permitted except as specifically prescribed in Rule 4 itself: "For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal." Fed. R. App. P. 26(b)(1). Both of these provisions assume that Rule 4(a)(5)(C) is jurisdictional and cannot be waived, forfeited, or expanded on the basis of any court's view of the equities.

There are important reasons for treating rules relating to notices of appeal so distinctly. It is these rules, after all, that ensure the finality of judgments. If courts were permitted to change these rules or forgive noncompliance for equitable reasons, the result would be that appeals—and thus finality—could be deferred "indefinitely." *Robinson*, 361 U.S. at 230; accord *Joshi*, 389 F.3d at 734; see *infra* II.A (discussing origins of the rule). And just as importantly, treating rules like Rule 4(a)(5)(C) as something other than "jurisdictional" in its traditional sense[3] would

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[3] The amicus brief by Professor Scott Dodson agrees that Rule 4(a)(5)(C) is jurisdictional—because it "is part of the boundary dividing authority between the district courts and the courts of appeals." Amicus Br. of Professor Dodson at 7–8. The brief goes on to argue, however, that even a jurisdictional rule may be subject to "flexibility" and "judicial discretion." *Id.* at 8. This theory

allow the lower federal courts to expand their own power over a case—a power that the Constitution reserves for Congress. *Bowles*, 551 U.S. at 212–13 ("Congress decides what cases the federal courts have jurisdiction to consider" and "can also determine when, and under what conditions, federal courts can hear them."); *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction."); *United States* v. *Curry*, 47 U.S. (6 How.) 106, 113 (1848) ("The power to hear and determine a case like this is conferred upon the court by acts of Congress, and * * * we have no power to dispense with any of these provisions, nor to change or modify them."). The fact that such rules are limits on *adjudicatory authority* explains why they apply even when the consequences would be inequitable or harsh.[4]

B. Contrary to Petitioner's argument, the 30-day limit in Rule 4(a)(5)(C) *does* have a statutory basis.

In addition to their discussion of the *nature* of jurisdictional rules, this Court's cases also attribute ju-

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would require what *Bowles* called "the repudiation of a century's worth of precedent and practice in the American courts." 551 U.S. at 209 n.2. And even Professor Dodson agrees that such "flexibility" would exist only if there were something in the rule itself to allow it. Amicus Br. of Professor Dodson at 8. Here, there is not.

[4] *Bowles* itself illustrates this point with stunning clarity. In a footnote, the Court recounts a recent instance in which the Clerk refused to accept a petition for certiorari in a capital case because it had been filed one day late and thus fell outside the power of the Court to consider—and the petitioner was executed soon after. *Bowles*, 551 U.S. at 212 n.4. It is difficult to imagine a harsher result.

risdictional significance to the fact that a rule is contained or rooted in an act of Congress. *Bowles*, 551 U.S. at 212–13. This flows naturally from the basic structure set out in the Constitution, which provides that "only Congress may determine a lower federal court's subject matter jurisdiction." *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 454, and citing U.S. Const. art. III § 1).

This brings us to the nub of the parties' disagreement. Petitioner's principal argument is that "Rule 4(a)(5)(C) is nonjurisdictional because it is not grounded in a statute." Pet. Br. 13. That is simply not so. When this Court promulgated Rule 4(a)(5)(C), the 30-day limit on extensions *was* specifically prescribed by statute—and had been since 1948. Although that limitation was removed during an amendment process in 1991, neither the intention nor the legal effect of that amendment was to strip the rule of its jurisdictional force. In short, the 30-day limit in Rule 4(a)(5)(C) did—and does—have its roots in an act of Congress, which further supports the conclusion that it is "jurisdictional."

1. When Rule 4(a)(5)(C) was promulgated, the 30-day limit on extensions was an explicit statutory requirement.

As Petitioner recognizes, 28 U.S.C. § 2107 historically *did* contain a 30-day limit on extensions of time to file a notice of appeal. Pet. Br. 12. The Act of June 25, 1948—which created what is now § 2107—contained the following in its fourth paragraph: "The district court, in any such action, suit or proceeding, may extend the time for appeal *not exceeding thirty days* from the expiration of the original time herein prescribed, upon a showing of excusible [*sic*] neglect

based on failure of a party to learn of the entry of the judgment, order or decree." Pub. L. No. 80-773 (June 25, 1948) ch. 131 § 2107, 62 Stat. 963 (emphasis added). This provision stayed substantially the same until 1991. See U.S. Code v.12 Titles 27–29, at 406 (1988).[5]

With the creation of the Federal Rules of Appellate Procedure in 1967, this Court promulgated Rule 4(a)(5)(C), reflecting and incorporating § 2107's statutory 30-day limit on extensions. Fed. R. App. P. 4(a) (1967) ("Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."), *in* Moore's Fed. Practice § 304 App.01 (3d ed. 2016). At the time of its adoption, then, the rule's 30-day limit on extensions was solidly grounded in—and reflected—a limitation adopted by Congress.

Indeed, even Rule 4(a)(5)(C)'s predecessor in the Federal Rules of Civil Procedure carried the authori-

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[5] Over the years, § 2107 was amended twice, but neither amendment has any significance for present purposes. An amendment in 1949 eliminated the words "in any such action, suit or proceeding" as superfluous and corrected the typographical error. Pub. L. No. 81-72 (May 24, 1949) ch. 139 §§ 107, 108, 63 Stat. 104–05. Then, as part of the Bankruptcy Act of 1978, Congress also amended § 2107 to strike the final paragraph excluding the applicability of the section's provision to bankruptcy courts. Pub. L. No. 95-598 (Nov. 6, 1978) title II § 248, 92 Stat. 2672. Presumably because of this Court's ruling in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982)—which struck down the 1978 Act—the version of the statute that was in place as of the 1991 amendments did not reflect the 1978 amendment.

ty of Congress. The 30-day limit on extensions first appeared in Federal Rule of Civil Procedure 73(a), which took effect in January 1947.[6] But Congress quickly grounded the rule in statute by its Act of June 25, 1948, which enacted into law most of the revised Federal Rules of Civil Procedure—and adopted § 2107 itself. H.R. Rep. No. 308, 80th Cong., at A174 (1947). Thus, Congress specifically authorized the jurisdictional rule that is now Rule 4(a)(5)(C) and provided it with a statutory basis.

2. Congress's 1991 amendment did not have the legal effect of eliminating the rule's jurisdictional force.

Petitioner's argument comes down to a single premise: The 30-day limit in Rule 4(a)(5)(C) cannot be jurisdictional because it does not appear in the *current* version of § 2107. This ignores the text, context, and background principles of the 1991 amendment. Properly understood, that amendment did not have the legal effect of stripping away the congressional authorization and jurisdictional character of the 30-day limit in Rule 4(a)(5)(C).

Congress amended § 2107 in 1991 "to make certain technical corrections" and to bring the provision into "conformity with rules of appellate procedure" as

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[6] The Advisory Committee proposed its first revision to the modern Federal Rules of Civil Procedure in June 1946 and, per the Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064, that revision became effective at the beginning of Congress's next session. The rule that contains the language that would become 28 U.S.C. § 2107 and would carry over to Federal Rule of Appellate Procedure 4(a)(5)(C) thus first appears as Federal Rule of Civil Procedure 73(a) in the U.S. Code effective as of January 2, 1947. See U.S. Code v.3 Titles 27–42, at 3327 (1946).

they had evolved over time. Pub. L. No. 102-198 (Dec. 9, 1991), 105 Stat. 1627 (title and caption heading) (Pet. App. 2a). It did so following a decision by the Judicial Conference of the United States "to recommend that Congress amend 28 U.S.C. § 2107 to conform to the [1991] proposed amendment to Rule 4(a) of the Federal Rules of Appellate Procedure and to eliminate the inconsistency between that section and the current version of Appellate Rule 4." Rep. of Procedure of Judicial Conf. of the U.S. at 101–02 (Sept. 1990). The amendment necessarily focused on *other* aspects of Rule 4, however, as the specific 30-day limit relevant here had not changed since its promulgation and thus was already in "conformity" with the statute then in effect.

In implementing these changes, the drafters of the legislation struck two existing paragraphs in § 2107, including the paragraph that related to extensions of the time for appeal:

> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U.S.C. § 2107 (1988) (Pet. Br. 1a); Pub. L. No. 102-198 (Dec. 9, 1991), 105 Stat. 1267. They replaced it with a longer paragraph providing details about extensions of time that would correspond to the changed aspects of Rule 4—and specifically, to the new provisions in Rules 4(a)(5) and 4(a)(6) concerning when the motion must be filed and what happens if

the party did not receive notice of the judgment.[7] The new provision reads as follows:

> (c) The district court may, upon motion filed no later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—
>
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced,
>
> the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

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[7] The original version of Rule 4(a)(5) had led to "considerable confusion" as to when a motion for extension of time could be filed. Fed. R. App. P. 4(a)(5) adv. comm. note to 1979 amendment. The rule was amended in the late 1970s to make clear that a motion for extension must be filed within the original 30 days for appeal. *Ibid.* Later, the Court adopted the new Rule 4(a)(6), relating to when and how long the time to appeal could be reopened if the appealing party had not been notified of the final judgment. Fed. R. App. P. 4 adv. comm. note to 1991 amendment. These were the time limits that were later at issue in *Bowles*. 551 U.S. at 207.

28 U.S.C. § 2107 (Pet. App. 50–56); see Pub. L. No. 102-198, 105 Stat. 1627.

In short, Congress inserted a longer and more detailed paragraph about extensions of time, in the place of a much shorter one. The House Report explains that the shorter one was then stricken "as no longer applicable." H.R. Rep. No. 322, 102d Cong. (1991) (cited at Pet. Br. 12, and reproduced at Pet. Br. 11a). In the process, though, Congress neglected to mention the still-effective 30-day limit on extensions of time contained in Rule 4(a)(5)(C).

There is no reason to interpret this omission as a choice by Congress to strip any part of Rule 4 of its jurisdictional significance. The plain language of the amendment certainly does not do so; it says nothing about Rule 4(a)(5)(C) or the 30-day limit at all. If Congress had intended to make a dramatic change in the nature of Rule 4(a)(5)(C) in 1991, surely it would have said so.

Indeed, we know what Congress intended to accomplish through the 1991 amendment—because Congress itself told us. Congress described the amendment as part of "[a]n Act to make certain *technical corrections* in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts." Pub. L. No. 102-198 (Dec. 9, 1991), 105 Stat. 1623 (title) (emphasis added) (Pet. App. 2a). Further, the caption explains that the changes were designed to bring the statute into "*conformity* with rules of appellate procedure" as they had evolved over time. 105 Stat. at 1627 (Pet. App. 2a) (emphasis added). To the extent the plain language and context of the statute leave any doubt, the caption and title of the amendment show that Congress intended it to *reinforce* all

the existing limitations in Federal Rule of Appellate Procedure 4(a), not undercut them.[8]

The omission's lack of significance is particularly clear in light of the "century's worth of precedent and practice in the American courts" that have treated time limits for filing notices of appeal "as jurisdictional." *Bowles*, 551 U.S. at 209 n.2. This Court presumes that Congress is aware of existing law when it enacts new legislation. *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 696–98 (1979). As Professors William Baude and Stephen Sachs have explained:

> Legislatures don't change the law in a vacuum. Like contracting parties, they act in a world already stuffed full of legal rules * * *. Even omnipotent legislatures, with the power to override any rule on the books, never use their power all at once. In our system, at least, new enactments are designed to take their place in an existing corpus juris, as new threads in a seamless web.

William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1098 (2017). In interpreting a legislative enactment, then, the Court should ask:

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[8] See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen* v. *Balt. & Ohio R. Co.*, 331 U.S. 519, 528–29 (1947)); see, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1083 (2015) (relying on the section caption and the act's title to aid the Court's interpretation of the statute's legal effect).

28 U.S.C. § 2107 (Pet. App. 50–56); see Pub. L. No. 102-198, 105 Stat. 1627.

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> How does it fit into the rest of the *corpus juris*? What do "the legal sources and authorities, taken all together, *establish*"? Questions like these presuppose some particular system of law, and their answers depend on the other legal rules in place. Language will of course be an input to the process, but law begins and ends the inquiry.

Id. at 1083 (internal footnote omitted).

This is precisely why this Court has hesitated to interpret technical amendments to statutes as making dramatic changes *sub silentio*. For example, in *Zuni Public School District No. 89* v. *Department of Education*, 550 U.S. 81, 84 (2007), the Court declined to interpret a new enactment as implicitly setting aside a long-established practice within the Department of Education. The Court explained:

> Congress adopted that language without comment or clarification. No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language (which, after all, was supplied by the Secretary) was intended to require, or did require, the Secretary to change the Department's system of calculation, a system that the Department and school districts across the Nation had followed for nearly 20 years, without (as far as we are told) any adverse effect.

Id. at 91; see also, *e.g.*, *Dir. of Revenue of Mo.* v. *CoBank ACB*, 531 U.S. 316, 322 (2001) ("Nothing in the statute indicates a repeal of the previous express approval of state taxation[.]"); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2796 (2014) (Ginsburg, J., dissenting) ("Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation.").

When Congress amended § 2107 in 1991, the 30-day limit in Rule 4(a)(5)(C) had been in place for decades in both rule and statute—and thus it was plainly jurisdictional. Again, "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles*, 551 U.S. at 209 n.2. Nothing in the text of the amendment purports to strip the 30-day limit of its jurisdictional significance, making it the one aspect of the rules regarding notices of appeal that is *not* jurisdictional. The amendment simply said nothing on the issue at all. Accordingly, the background law as it existed at the time of the amendment—including the proposition that time limits relating to notices of appeal are jurisdictional—continues in effect.

In short, Rule 4(a)(5)(C) is jurisdictional in terms of both its nature and its statutory basis. The Court emphasized the issue of statutory basis in *Bowles* because "Congress decides what cases the federal courts have jurisdiction to consider" and "can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212–13. Here, Congress *did* make such a determination many decades ago, adopting various time limits for notices of appeal, including a 30-day limit on extensions. That

statutory basis existed when Rule 4(a)(5)(C) was promulgated—which eliminates any doubt that the 30-day limit is a jurisdictional rule authorized by Congress. There is no reason to interpret the 1991 amendment as stripping the rule of either its congressional authorization or its jurisdictional effect.

II. Even if the 30-day limit in Rule 4(a)(5)(C) is *not* jurisdictional, it must be enforced here.

In the end, however, the distinction between jurisdictional and non-jurisdictional rules does not make a difference in this case.[9] As discussed below, even if Rule 4(a)(5)(C) were not "jurisdictional," it would remain the type of mandatory claim-processing rule that is "unalterable" and immune to equitable exceptions. *Manrique*, 137 S. Ct. at 1271. On this basis, this Court could—and recently did—decline to address the question of jurisdictionality altogether. See *ibid.* And even if equitable exceptions were otherwise available, the "unique circumstances" doctrine—assuming it still exists—would not apply here.

The only remaining question, then, is whether Respondents waived or forfeited the application of Rule 4(a)(5)(C) as a mandatory claim-processing rule. As discussed below, the answer is no. Respondents raised the issue of Rule 4(a)(5)(C) in their first substantive filing before the Seventh Circuit. Under both the Federal Rules and the Seventh Circuit's Local Rules, this was more than sufficient.

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[9] Respondents included this point in their Brief in Opposition as a reason to deny certiorari. Br. in Opp. 6.

A. Rule 4(a)(5)(C) is mandatory and thus not subject to equitable exceptions.[10]

As this Court has repeatedly held, Rule 4 "establishes mandatory time limits for filing a notice of appeal." *Gonzalez* v. *Thaler*, 565 U.S. 134, 147 (2012).[11] Mandatory rules limiting an appeal are "unalterable," and thus "if a party properly raises them," it is "the court's duty to dismiss the appeal." *Manrique*, 137 S. Ct. at 1271–72. This Court held as much just a few months ago in *Manrique*—a case involving the application of Rule 4(b) following an order of restitution in a criminal case. *Ibid.* Indeed, the Court declined to decide whether the rule was jurisdictional, holding that the rule was "at least a mandatory claim-processing rule" and thus was not susceptible to exceptions in any event. *Id.* at 1271. And if Rule 4(b) is "at least a mandatory claim-processing rule," so too is Rule 4(a)(5)(C). *Ibid.*

The unambiguous text and structure of the rule confirm this characterization. Rule 4(a) allows 30 days for a notice of appeal in any civil case that does not involve the U.S. government. Because that strict

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[10] Petitioner's amicus agrees. The brief submitted by the American Academy of Appellate Lawyers contends that if Rule 4(a)(5)(C) is not jurisdictional, it still "should be construed as a mandatory claim-processing rule" that is "'unalterable'" and thus not subject to equitable exceptions. Amicus Br. of American Academy of Appellate Lawyers in Support of Petitioner at 10 (quoting *Manrique*, 137 S. Ct. at 1272).

[11] See also *Torres*, 487 U.S. at 315 (noting the "mandatory nature of the time limits contained in Rule 4"); *Griggs*, 459 U.S. at 61 (observing that the timely filing of a notice of appeal is "mandatory"); *Robinson*, 361 U.S. at 224 (same); *Browder*, 434 U.S. at 264 (explaining that "Fed. Rule App. Proc. 4(a) and 28 U.S.C. § 2107" create strict, "mandatory" time limits).

limit might be too harsh, however, the rule allows several exceptions. If the litigant did not receive timely notice of the judgment, for example, the district court "may reopen the time to file an appeal" for a limited period. Fed. R. App. P. 4(a)(6). The rule also allows for extensions of time—and provides a more lenient timetable for litigants who can show "excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A)(ii). But even for an extension under that more lenient rule—that is, *even if a litigant has already shown "excusable neglect or good cause"*—Rule 4(a)(5)(C) still limits the available extension to 30 days. (Emphasis added.)

Nothing in the rule's text grants a district court or court of appeals the ability to allow additional time. Indeed, the fact that the rule already contains exceptions is sufficient by itself to prevent a court from grafting on additional ones. Cf. *United States* v. *Beggerly*, 524 U.S. 38, 48–49 (1998) ("[e]quitable tolling is not permissible where" the statute already provides for equitable exceptions); *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997) (statute's "explicit listing of exceptions" shows that its drafters did not intend courts to apply "other unmentioned, open-ended, 'equitable' exceptions"). And as noted above, Rule 26(b) instructs that "the court may not extend the time to file * * * a notice of appeal (except as authorized in Rule 4)." See *Torres*, 487 U.S. at 314–15 (noting that the "good cause" equitable exceptions in Rule 26(b) are specifically not available for the time limits under Rule 4). There is simply no room for additional exceptions.

And rightly so. Firm deadlines and limits on notices of appeal are essential to promote finality, to set

a definite point of time for the end of litigation, and to prevent the appeal of old and stale claims. *Browder*, 434 U.S. at 264 ("The purpose of the rule is clear: It is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.") (quotation marks omitted). Indeed, this is exactly why the limits on extensions were adopted in the first place. See Fed. R. Civ. P. 73 adv. comm. notes to 1946 amendment (explaining that the 30-day limit "avoids the difficulty of indefinite lack of finality of the judgment, by providing that the extension of the time for appeal as the result of excusable neglect for failing to receive notice of it must be limited to an additional thirty days."). Even if the result in a particular case may seem inequitable, having firm rules of procedure is "a necessary part of an orderly system of justice." *Thompson* v. *INS*, 375 U.S. 384, 390 (1964) (per curiam) (Clark, J., dissenting). And if the inflexibility of a rule "has turned out to work hardship," the issue should be addressed "by the process of amendment, not by ad hoc relaxations" by the courts in particular cases. *Ibid.*; *Houston* v. *Lack*, 487 U.S. 266, 283 (1988) (Scalia, J., dissenting, joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J.) (citing the same).

Rule 4(a)(5)(C) is fundamentally different from the federal statutes of limitations and other rules on which Petitioner's argument relies. See Pet. Br. 36–37, 39–41. Petitioner argues that a time limit can only be interpreted as "mandating an automatic disposition of a claim or defense without regard to the circumstances" if it "says so explicitly." *Id.* at 39. If it does not, the time limit is subject to equitable excep-

tions. *Ibid.* But the Federal Rules of Appellate Procedure *do* contain explicit language tying untimeliness to an "automatic disposition" of the appeal. Rule 4(a)(5)(C) operates in conjunction with Rule 3, which provides that an appeal "may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." Fed. R. App. P. 3(a)(1). Subsection (a)(2) of that rule provides that "[a]n Appellant's failure to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." (Emphasis added.) The text of Rule 3 thus demonstrates that an untimely notice undermines the appeal's "validity," which necessarily requires dismissing the appeal. See *Torres*, 487 U.S. at 314. This Court recognized as much in *Manrique*, explaining that without a proper notice of appeal, "'the court's duty to dismiss the appeal [is] mandatory,'" whether or not the defect is jurisdictional. 137 S. Ct. at 1272 (quoting *Eberhart* v. *United States*, 546 U.S. 12, 18 (2005)).[12]

Indeed, the same reasoning that gives rise to a "'rebuttable presumption' in favor of 'equitable tolling'" for statutes of limitations (Pet. Br. 36) actually *undermines* any comparable presumption for Rule 4(a)(5)(C). As discussed above, statutes and rules are always adopted in the context of existing law. See *supra* I.B.2. For statutes of limitations, "'[i]t is horn-

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[12] For the same reasons, the explicit terms of Rules 3 and 4 distinguish those rules from the rule at issue in *Schacht* v. *United States*, 398 U.S. 58 (1970), which "contain[ed] no language" that would have made a late filing fatal to the appeal. *Id.* at 63–64, quoted in Pet. Br. 34–35.

book law that limitations periods are customarily subject to equitable tolling.'" Pet Br. 36 (quoting *Young* v. *United States*, 535 U.S. 43, 49 (2002)). For that reason, statutes of limitations are presumed to *allow* equitable tolling, "unless tolling would be inconsistent with the text of the relevant statute." *Young*, 535 U.S. at 49. But a very different set of background principles applies with respect to time limits for notices of appeal, and those principles swing the "presumption" the other way. As discussed above, a century's worth of cases have regarded time limits relating to notices of appeal as "mandatory and jurisdictional." See *supra* I.A. Even if this particular limitation in Rule 4 somehow lacks "jurisdictional" significance, it must therefore be presumed "mandatory" and *not* subject to equitable exceptions.

Petitioner's reliance on the harmless error doctrine is particularly misplaced. According to Petitioner's brief, "[r]ecognition of equitable considerations with respect to Rule 4(a)(5)(C) is also consistent with other provisions that make clear that a district court's order should not be upset in the absence of harm to the parties." Pet. Br. 40 (citing 28 U.S.C. § 2111). This argument is flatly inconsistent with *Manrique*. The petitioner in that case had argued that his failure to file a separate notice of appeal from a subsequent district court order was "harmless" and should not result in dismissal. This Court rejected that argument, holding that "[b]y definition, mandatory claim-processing rules, although subject to forfeiture, are not subject to harmless-error analysis." 137 S. Ct. at 1274. The harmless error doctrine thus does not help Petitioner's argument. The rule is mandatory, and it is not subject to *any* exception other than the ones found within the rule itself.

B. Even if Rule 4(a)(5)(C) *were* subject to equitable exceptions, the unique circumstances doctrine would not apply here.

Even if Rule 4(a)(5)(C) were somehow alterable based on equitable considerations, the "unique circumstances" doctrine would not help Petitioner's case. This is a narrow, long-dormant doctrine designed to address the hardship of a litigant who reasonably relies on a mistake by the district court relating to the time for appeal. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215, 215–16 (1962) (per curiam); see also *Thompson*, 375 U.S. at 387. On the facts of this case, the doctrine would not apply.

As an initial matter, it is far from clear whether the unique circumstances doctrine is alive and well.[13] The only case since *Harris Truck* and *Thompson* in which the Court actually applied the unique circumstances doctrine was a summary reversal more than 50 years ago. See *Wolfsohn* v. *Hankin*, 376 U.S. 203, 203 (1964) (per curiam). In *Bowles*, this Court specifically declined an invitation to revive the doctrine, "see[ing] no compelling reason to resurrect [it] from its 40-year [now 50-year] slumber." 551 U.S. at 214.

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[13] See *Bowles*, 551 U.S. at 214 (acknowledging that the doctrine's "continuing validity" is "rightly questioned"); *Hollins* v. *Dep't of Corr.*, 191 F.3d 1324, 1327 (11th Cir. 1999) (remarking on "the Supreme Court's shaky support for the [unique circumstances] doctrine"); *In re Home & Family, Inc.*, 85 F.3d 478, 481 (10th Cir. 1996) (calling unique circumstances "a disfavored doctrine that is to be applied only in 'carefully limited circumstances'") (citation omitted); *Kraus* v. *Consol. Rail Corp.*, 899 F.2d 1360, 1364–65 (3d Cir. 1990) (stating that "the scope of the 'unique circumstances' rule remains murky" and suggesting its "foundations" are "tenuous").

And, critically, in the *Manrique* decision last term, the Court observed that even a *non*-jurisdictional rule relating to notices of appeal is mandatory and thus "'unalterable.'" 137 S. Ct. at 1272 (citation omitted). These recent precedents defeat any remaining notion that a court may simply forgive noncompliance with rules relating to notices of appeal in light of "unique circumstances."

In any event, this doctrine would not apply here. As an initial matter, there is no ambiguity in Rule 4(a)(5)(C) that would allow room for the doctrine to operate. See *Props. Unlimited Inc. Realtors* v. *Cendant Mobility Servs.*, 384 F.3d 917, 922 (7th Cir. 2004) (doctrine is not available unless there is "genuine ambiguity in the rules"). And moreover, the error in this case was introduced by *Petitioner's own counsel*, who specifically asked the district court to enter an extension of time that would last 60 days—30 days longer than Rule 4(a)(5)(C) would allow. See Pet. Br. 41–42. As a matter of law, then, Petitioner cannot claim that she was the victim of a court-created error on which she reasonably relied—a basic requirement for the unique circumstances doctrine.[14] As one court explained, "a party cannot reasonably rely on a district court's improper extension of time where the party requests relief that, as a plain reading of the Rules would show, is beyond the court's authority." *Panhorst* v. *United States*, 241 F.3d 367, 373 (4th Cir. 2001) (agreeing with the "Second, Third, Tenth, and

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[14] In this respect, the facts here are materially different from those that the dissent in *Bowles* concluded would justify application of the unique circumstances doctrine. 551 U.S. at 221–22 (Souter, J., dissenting) (emphasizing that the error in *Bowles* originated with the district court, not with counsel).

Eleventh Circuits" on this point); see also *Allender* v. *Raytheon Aircraft Co.*, 439 F.3d 1236, 1241 (10th Cir. 2006) (holding that a party's reliance on "an extension that is prohibited by the federal rules" does not justify application of the unique circumstances doctrine when the party asked for the extension and thus invited the error).

In short, the error here lies with Petitioner's last appointed counsel, who asked for (and received) an extension twice as long as what the rules allow. Nothing in the rules allows a litigant to reverse the consequences of a late filing—whether jurisdictional or not—on the ground that her lawyer made a mistake.

C. Respondents did not waive or forfeit their ability to invoke Rule 4(a)(C)(5) as a mandatory claim-processing rule.

For all the reasons discussed above, the only possible significance to the "jurisdictional" question in this case would be if Respondents had waived or forfeited any reliance on Rule 4(a)(5)(C). If the rule is jurisdictional, waiver and forfeiture would not apply. But "[u]nlike jurisdictional rules, mandatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point." *Manrique*, 137 S. Ct. at 1272 (citation omitted).

Here, however, there was no waiver or forfeiture. Respondents briefed the timeliness defect before merits briefing in the Seventh Circuit. Indeed, Respondents' pre-merits briefing specifically addressed the impact of Rule 4(a)(5)(C)—*including the argument that the rule is mandatory and must be enforced even if it is not jurisdictional.* Under the Seventh Circuit's precedents, because Respondents asserted the un-

timeliness defense before addressing the merits of the appeal, they did not forfeit the defense. See *Trepanier* v. *City of Blue Island*, 364 F. App'x 260, 262–63 (7th Cir. 2010) (citing *United States* v. *Singletary*, 471 F.3d 193, 196 (D.C. Cir. 2006), for the proposition that a litigant preserves an untimeliness argument as long as it asserts the contention before addressing the merits of the appeal); see also *Manrique*, 137 S. Ct. at 1272 (holding that respondent timely raised an untimeliness defense by raising it concurrently with the merits in the court of appeals).

Petitioner's various arguments for waiver and forfeiture are inappropriate and should be disregarded. In the Seventh Circuit, Petitioner referenced waiver and forfeiture in only one respect: She argued that Respondents waived and forfeited any reliance on the rule because they "acknowledge[d]" they were not aware of the timeliness problem until the Seventh Circuit asked for briefing on the issue. Hamer Reply Br. 6. Petitioner did not argue that any specific action or omission by Respondents—like submitting a docketing statement or failing to file a cross-appeal—constituted waiver or forfeiture. She should not be permitted to raise such arguments now.

In any event, there was no waiver or forfeiture here. In the district court, for example, Respondents had no obligation to object to Petitioner's request for an overlength extension or to correct the error by her counsel under Rule 4(a)(5)(C). See Pet. Br. 23–24 (arguing forfeiture on this basis). Petitioner's counsel filed a motion requesting a 60-day extension, and the district court granted the motion the same day. Petitioner's counsel did not confer with Respondents about the extension before filing the motion, and the

court did not seek or wait for Respondents' position before ruling. Under the governing local rules, "the absence of a response is not deemed to waive any objection to a postjudgment motion." *Trepanier*, 364 F. App'x at 263 (citing N.D. Ill. Loc. R. 78.3).

Nor did Respondents have any obligation to file a notice of appeal from the entry of the 60-day extension. Respondents were not aggrieved by the extension itself; if counsel's error in seeking that extension ultimately led to confusion about the proper time for appeal, that would be a problem for Petitioner and her counsel, not for Respondents. Further, any appeal from the extension order would have been due 30 days later—on November 9, 2015. Pet. Br. 26. But the original deadline for Petitioner's appeal was October 14, and Rule 4(a)(5)(C) would have allowed an extension until November 14. On November 9, therefore, Respondents were not in a position to know whether Petitioner intended to appeal at all, much less whether she would file her notice of appeal before or after November 14, the proper deadline. Respondents also did not know until much later that Petitioner would ultimately proceed *pro se*, rather than with "new counsel," as the motion had suggested. As noted above, the purpose of the extension was "to allow new counsel for Charmaine Hamer to evaluate this Court's judgment and determine whether an appeal should be pursued." Pet. App. 58 ¶ 3.

Similarly, no cross-appeal was required—nor would it even have been proper under the circumstances. Under *Jennings* v. *Stephens*, 135 S. Ct. 793 (2015), a cross-appeal is appropriate and necessary if the appellee wishes to "attack the [district court's] decree with a view either to enlarging his own rights

thereunder or [to] lessening the rights of his adversary." *Id.* at 798 (citations omitted). Here, however, Respondents have never attacked the district court's "decree"—a judgment that resolved the case in Respondents' favor in all respects. Nor have they sought to "enlarge" their own rights in respect to the judgment. By invoking the time limits in Rule 4, Respondents simply sought to have the appeal dismissed, which would mean that the rights of both Respondents and Petitioner would remain exactly where the district court's judgment left them. The Tenth Circuit analyzed the issue as follows:

> [W]e believe that it was not necessary for the [appellee] to file a cross-appeal from the district court's order granting an extension of time to appeal. In moving for dismissal of the appeal, the [appellee] was not seeking alteration of the judgment below in its favor.

United States v. *Madrid*, 633 F.3d 1222, 1225 (10th Cir. 2011).[15]

Petitioner's final argument is that Respondents "committed both waiver and forfeiture" when they filed a docketing statement in the Seventh Circuit stating that Petitioner "'filed a timely Notice of Ap-

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[15] Although the federal courts of appeals are not in agreement on these issues (see Pet. Br. 24), the cross-appeal rule is a rule of practice in the federal courts, and this Court has generally left the application of the rule to the courts of appeals themselves. *Greenlaw* v. *United States*, 554 U.S. 237, 255 (2008) (Breyer, J., concurring) (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951)). If there is any uncertainty about how the cross-appeal rule should apply here, the matter should be left to the Seventh Circuit to resolve in the first instance.

peal.'" Pet. Br. 28. This argument ignores the context of the assertions themselves, as well as the nature of docketing statements in the Seventh Circuit and elsewhere.

First and foremost, the assertions Petitioner cites were about the Seventh Circuit's *jurisdiction*, not about any violation of a non-jurisdictional claim-processing rule.[16] Obviously, waiver and forfeiture are relevant here only to the extent that the 30-day limit in Rule 4(a)(5)(C) is *not* jurisdictional. By definition, Respondents' assertion that the Seventh Circuit had *jurisdiction* over the appeal was not an "intentional relinquishment or abandonment of a known right" to demand the proper application of a *non-jurisdictional* but mandatory claim-processing rule. *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (defining "waiver").

More fundamentally, a docketing statement is a creature of a court's local rules, and Petitioner cites no authority for the proposition that the Seventh Circuit would consider an assertion in a docketing statement as a waiver or forfeiture. Rule 3(c)(1) of the Seventh Circuit's rules requires that an appellant file and serve a docketing statement within seven days of filing the notice of appeal. 7th Cir. R. 3(c)(1). If the docketing statement is not complete and correct, the appellee must provide a complete one 14

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[16] Pet. App. 63 ("The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291, in that on December 11, 2015, Plaintiff-Appellant filed a timely Notice of Appeal."); see also Pet. App. 64 (again stating that "Plaintiff-Appellant timely filed a Notice of Appeal," in the sense that the notice fell within the extension that the district court had granted).

days later. *Id.* The docketing statement is designed for use by the Clerk—to confirm the caption and relevant counsel, to identify related cases, and to provide information relevant to the court's jurisdiction. 7th Cir. R. 3(c)(1) (basic requirements); 7th Cir. R. 28(a) (jurisdictional information). According to the Seventh Circuit's Handbook, "[o]bjections to the jurisdiction of either the district court or appellate court should be noted in the docketing statement at the outset of the appeal." Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, § VI.B at 21 (2017). Yet there is no requirement that appellees identify any other, non-jurisdictional defects or issues in that document.

Moreover, similar docketing statements are in use in other circuits, and those courts have consistently reiterated that they are non-binding. See, *e.g.*, *United States* v. *Pogue*, 19 F.3d 663, 666 (D.C. Cir. 1994) ("The docketing statement is used principally to aid the court in its initial screening of a case; it does not irrevocably define the limits of the scope of an appeal."); see also *St. John's United Church of Christ* v. *City of Chicago*, 401 F. Supp. 2d 887, 903 (N.D. Ill. 2005) (noting that a D.C. Circuit docketing statement was "non-binding"), *aff'd*, 502 F.3d 616 (7th Cir. 2007); see also, *e.g.*, Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit, § III.A, at 24 (2017) ("[O]mission of an issue from the docketing statement does not preclude argument on that issue in appellant's brief."); 1st Cir. R. 3.0(a) ("[E]rrors or omissions in this separate statement alone shall not otherwise affect the appeal if the notice of appeal itself complies with this rule"); 4th Cir. R. 3(b) ("Although a party will not be precluded from raising additional issues, counsel should make every

effort to include in the docketing statement all of the issues that will be presented to the Court.").

To the extent there is any doubt about the significance of docketing statements in the Seventh Circuit, this Court should leave that question for the Seventh Circuit to resolve in the first instance. But the Seventh Circuit's docketing statements are similar in function and design to those in its sister circuits, and there is no reason to think that it would treat assertions in its own docketing statements any differently. As long as Respondents raised the issue before merits briefing—and we did—the issue has been sufficiently preserved.

CONCLUSION

The judgment should be affirmed, either on the ground that the 30-day limit in Rule 4(a)(5)(C) is jurisdictional in its nature and basis, or on the ground that it is at least a mandatory claim-processing rule that does not allow equitable exceptions.

Respectfully submitted.

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CHARMAINE HAMER,

Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule 3

A. Respondents' Arguments Are Premised on an Incorrect Understanding of Jurisdiction 3

1. Court-Promulgated Rules Do Not Have Jurisdictional Significance Apart from Statutes 3

2. Time Limitations that Set Boundaries Between Adjudicative Forums Are Not Necessarily Jurisdictional 6

B. Rule 4(a)(5)(C) Does Not Derive from pre-1991 § 2107 or from Any Other Statute .. 8

1. The History and Plain Text of the Relevant Rules and Statutes Confirm that Rule 4(a)(5)(C) Does Not Derive from Any Statute 8

2. The House Report Further Confirms that the Omission of Rule 4(a)(5)(C) from § 2107(c) Was Intentional 11

C. Even if Rule 4(a)(5)(C) Were Seen as Deriving from pre-1991 § 2107, the Rule Would Not Be Jurisdictional 13

D. Interpreting the 30-day Limit in Rule 4(a)(5)(C) as Jurisdictional Would Be Inconsistent with the Rest of the Rule .. 15

II. Respondents Forfeited and Waived the Right to Invoke Rule 4(a)(5)(C) 16

A. Respondents Committed Forfeiture by Failing to Raise Any Objection to the District Court 17

B. Respondents Committed Forfeiture by Failing to Appeal or Cross-Appeal 18

C. Respondents Committed Forfeiture and Waiver Through Their Statements to the Seventh Circuit 19

III. Equitable Considerations Are Properly Taken Into Account, and They Preclude Dismissal of the Appeal Here 20

A. Recognition of Equitable Considerations Is Consistent with Federal Statutes 20

B. Recognition of Equitable Considerations Is Consistent with the Federal Rules 21

C. The Unique-Circumstances Doctrine Precludes the Dismissal of Ms. Hamer's Appeal 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

650 Park Ave. Corp. v. McRae,
836 F.2d 764 (2d Cir. 1988) 12

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 13

Becker v. Montgomery,
532 U.S. 757 (2001) 22

Bowles v. Russell,
551 U.S. 205 (2007) 3, 4

Christian Legal Soc'y v. Martinez,
561 U.S. 661 (2010) 19

Eberhart v. United States,
546 U.S. 12 (2005) 5

Erickson v. Pardus,
551 U.S. 89 (2007) 17

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,
371 U.S. 215 (1962) 1, 23

Henderson v. Shinseki,
562 U.S. 428 (2011) 7, 14

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990) 14

Kontrick v. Ryan,
540 U.S. 443 (2004) 5, 23

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 17

Manrique v. United States,
137 S. Ct. 1266 (2017) 21, 22

Pierce Cty. v. Guillen,
537 U.S. 129 (2003) 15

Reed Elsevier, Inc. v. Muchnick,
559 U.S. 154 (2010) 7

Schacht v. United States,
398 U.S. 58 (1970) 7

Sebelius v. Auburn Reg'l Med. Ctr.,
133 S. Ct. 817 (2013) 13

Smith v. Barry,
502 U.S. 244 (1992) 22

Thompson v. INS,
375 U.S. 384 (1964) 1, 23, 24

Torres v. Oakland Scavenger Co.,
487 U.S. 312 (1988) 5, 6

United States v. Robinson,
361 U.S. 220 (1960) 4, 5

United States v. Smith,
331 U.S. 469 (1947) 5

United States v. Wong,
135 S. Ct. 1625 (2015) 14, 22

CONSTITUTION

U.S. Const. art. III 2, 6

STATUTES, RULES, AND PUBLIC LAWS

28 U.S.C. § 2107 ..... *passim*

28 U.S.C. § 2107(c) ..... *passim*

28 U.S.C. § 2107, ¶ 4 (1988) 8

28 U.S.C. § 2111 21

Fed. R. App. P. 3 22

Fed. R. App. P. 3(a)(2) 21, 22

Fed. R. App. P. 4(a) 10, 12, 13

Fed. R. App. P. 4(a)(5) ..... *passim*

Fed. R. App. P. 4(a)(5)(A) 11

Fed. R. App. P. 4(a)(5)(C) ..... *passim*

Fed. R. App. P. 4(a)(6) ..... *passim*

Fed. R. Civ. P. 23(f) 7

Fed. R. Civ. P. 54(b) 7

Fed. R. Civ. P. 82 7

Fed. R. Civ. P. 83(a)(1) 18

Sup. Ct. R. 15.2 17

Pub. L. No. 102-198, § 12, 105 Stat. 1623 (1991) 10, 13

OTHER AUTHORITIES

H.R. Rep. No. 102-322, 1991 U.S.C.C.A.N. 1303 (1991) 11, 12

ARGUMENT

Respondents Neighborhood Housing Services of Chicago and Fannie Mae (collectively "Respondents") offer no response to several arguments that Petitioner Charmaine Hamer ("Ms. Hamer") makes in her opening brief.

First, other than alleging that Congress inadvertently omitted a 30-day limitation from 28 U.S.C. § 2107(c), Respondents offer no answer to Ms. Hamer's argument that the structure and history of the statute strongly demonstrate that no maximum extension was intended in the first part of that statute.

Second, Respondents offer no substantive response to Ms. Hamer's cited cases that explain why an appeal or a cross-appeal is needed to challenge a district court's extension of time to appeal. Nor do they substantively dispute that a reversal of a district court's extension of time lessens an appellant's rights (and, correspondingly, enlarges an appellee's rights).

Third, Respondents offer no response to Ms. Hamer's argument that the facts of this case fall squarely within the unique-circumstances doctrine as originally set forth in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and as expanded upon in *Thompson v. INS*, 375 U.S. 384 (1964). Nor do they respond to Ms. Hamer's argument that a failure to recognize equitable considerations would be inconsistent with § 2107(c), which invokes the equitable considerations of excusable neglect and good cause without setting a maximum extension.

Respondents' argument that Rule 4(a)(5)(C) is jurisdictional suffers from several fundamental flaws. First, Respondents erroneously assume—contrary to this Court's precedents and Article III of the Constitution—that a court-promulgated rule, separate from a statute, can have jurisdictional significance. Additionally, Respondents mistakenly argue that Rule 4(a)(5)(C) derives from a statute because the Rule's 30-day limit stems from a statutory time limitation that was repealed in 1991. Aside from the inherent flaws in relying on a repealed provision to impute congressional intent to set a jurisdictional limitation, Respondents' argument rests on a misunderstanding of the pre-1991 statute and the 1991 amendments that followed. A proper understanding of pre-1991 § 2107 and the 1991 addition of § 2107(c) shows that Rule 4(a)(5)(C) does not derive from a statute. Hence, Rule 4(a)(5)(C) is nonjurisdictional. This Court should reverse the Seventh Circuit's contrary holding.

Respondents' arguments against waiver, forfeiture, and the unique-circumstances doctrine fare no better. Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule and is subject to forfeiture and waiver by an appellee. Respondents here have forfeited and waived their right to invoke Rule 4(a)(5)(C). Moreover, recognition of equitable considerations such as the unique-circumstances doctrine is fully consistent with the Rules, pertinent statutes, and this Court's precedents, and the doctrine bars the dismissal of Ms. Hamer's appeal here. Therefore, this Court should instruct the Seventh Circuit to consider Ms. Hamer's appeal on the merits.

I. Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule

Respondents' argument that Rule 4(a)(5)(C) contains a jurisdictional time limitation is inconsistent with this Court's precedents and is based upon a misunderstanding of jurisdiction, a flawed interpretation of pre-1991 § 2107 and the 1991 amendments that followed, and a violation of fundamental principles of statutory interpretation.

A. Respondents' Arguments Are Premised on an Incorrect Understanding of Jurisdiction

1. Court-Promulgated Rules Do Not Have Jurisdictional Significance Apart from Statutes

Respondents' argument that Rule 4(a)(5)(C) is jurisdictional is largely—if not entirely—premised on the contention that the 1991 amendments to § 2107 should not be interpreted to "strip[] Rule 4(a)(5)(C) of its jurisdictional significance." Resp. Br. 2, 5-6, 8, 15, 17, 20, 23, 24. This premise is false because it wrongly assumes that the Rule ever had jurisdictional significance. Contrary to Respondents' suggestion, and as explained in detail in Ms. Hamer's opening brief (Pet. Br. 13-18), this Court has long held that court-promulgated rules do not have jurisdictional significance.

For instance, in *Bowles v. Russell*, 551 U.S. 205 (2007), the timing of the notice of appeal violated both § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6). In holding that the appeal was jurisdictionally

barred, this Court did not hold that Rule 4(a)(6) was itself a jurisdictional rule. Instead, the Court held that the ***statutory*** 14-day time period for reopening an appeal set forth in § 2107(c) was jurisdictional. *Bowles*, 551 U.S. at 213 (finding the time period jurisdictional "[b]ecause Congress specifically limited the amount of time" for which a district court could reopen the period to appeal). Indeed, the Court reaffirmed the longstanding principle that nonstatutory time periods are nonjurisdictional, noted "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress[,]" and recognized that the Court's Rule setting a 90-day period for petitioning for certiorari is jurisdictional only for civil cases because a statute sets the time limitation for civil cases, but not for criminal cases. *Id.* at 211-12. Under this reasoning, Rule 4(a)(6), separate from § 2107(c), is nonjurisdictional.

Here, in sharp contrast to *Bowles*, a violation of Rule 4(a)(5)(C) does not constitute a statutory violation. Indeed, § 2107(c) contains no limit on an extension's length if the motion for an extension of time is filed no later than 30 days after the expiration of the time otherwise set to appeal. Thus, the district court's extension of time in this case was fully compliant with § 2107(c). Respondents do not dispute this, and they make no argument—nor could they—that the timing of Ms. Hamer's notice of appeal violated any statute. Because Ms. Hamer's appeal was statutorily timely, any violation of Rule 4(a)(5)(C) does not deprive the Seventh Circuit of jurisdiction.

Respondents misplace reliance on *United States v. Robinson*, 361 U.S. 220 (1960) to argue that court-

promulgated rules can be jurisdictional. Although Respondents concede that this Court "has questioned some aspects of *Robinson* in recent years," Respondents ignore that the portions of *Robinson* upon which they base their arguments are the very aspects that this Court has questioned. Resp. Br. 9-10. Indeed, this Court subsequently recognized that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction[,]" and that nonstatutory rules promulgated by this Court "do not create or withdraw federal jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004). Because *Robinson* involved a nonstatutory deadline in a Rule of Criminal Procedure, that deadline cannot be jurisdictional. One year after *Kontrick*, the Court further clarified this point, explicitly stating that *Robinson* (as well as *United States v. Smith*, 331 U.S. 469 (1947)) "[did] not hold the limits of the Rules to be jurisdictional in the proper sense that *Kontrick* describes." *Eberhart v. United States*, 546 U.S. 12, 16 (2005). Because Rule 4(a)(5)(C) is nonstatutory, it is not jurisdictional "in the proper sense that *Kontrick* describes." *Robinson* is therefore of no assistance to Respondents.

Respondents further misplace reliance on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) to argue that Rule 4 is "jurisdictional in nature." Resp. Br. 11-12. *Torres*, however, found that Federal Rule of Appellate Procedure 3(c), as it then existed,[1] was "jurisdictional" only after determining that the Rule was "imposed by the legislature and not by the judicial process." *Torres*, 487 U.S. at 318 (citation omitted). In

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[1] The Rule has since been amended to abrogate the Court's holding in *Torres*.

sharp contrast, Rule 4(a)(5)(C) is not imposed by the legislature. Therefore, even assuming *arguendo* that the jurisdictionality holding in *Torres* remains good law in light of this Court's more recent cases clarifying the distinction between jurisdictional and nonjurisdictional requirements, *Torres* does not support Respondents' argument that Rule 4(a)(5)(C) is jurisdictional.

2. Time Limitations that Set Boundaries Between Adjudicative Forums Are Not Necessarily Jurisdictional

Respondents' misunderstanding of jurisdiction is also evident from their apparent approval (Resp. Br. 13 n.3) of Professor Dodson's argument that a Rule or statute is jurisdictional when it "sets boundaries between adjudicative forums." Dodson Br. at 5.[2] This understanding of jurisdiction is incorrect because it is inconsistent with this Court's precedents and the Federal Rules. For example, under Professor Dodson's definition, a statute limiting the time to appeal from the Board of Veterans' Appeals to the Court of Appeals for Veterans' Claims would be jurisdictional because it sets boundaries between these two adjudicative forums. Yet this Court unanimously held that this time period

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[2] Respondents, however, do not defend Professor Dodson's argument (Dodson Br. 7-8 n.2) that whether or not a time limitation is set forth in a statute is "irrelevant" to the jurisdictionality inquiry. Resp. Br. 8 (recognizing that a jurisdictional time limit must have a statutory basis). This is wise, because as explained *infra* and in Ms. Hamer's opening brief (Pet. Br. 13-18), this Court's longstanding precedents, as well as Article III, foreclose nonstatutory deadlines from implicating a court's jurisdiction.

is nonjurisdictional. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011); *see also Schacht v. United States*, 398 U.S. 58, 63-64 (1970) (concluding that this Court's Rule concerning the deadline to petition for certiorari in a criminal case is nonjurisdictional because the deadline is nonstatutory). Additionally, under Professor Dodson's definition, Rule 54(b) would be jurisdictional because it gives district courts discretion to determine when to certify a subset of claims in a case as final and appealable, and thus to permit the transfer of adjudicatory authority from the district court to the court of appeals. Fed. R. Civ. P. 54(b). Similarly, Rule 23(f) would be jurisdictional under Professor Dodson's definition because this Rule gives a court of appeals discretion to permit an appeal of certain class-certification decisions that would otherwise not be appealable, and thus to transfer adjudicatory authority from the district court to the court of appeals. Fed. R. Civ. P. 23(f). Yet the Federal Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts[.]" Fed. R. Civ. P. 82. Professor Dodson's proposed definition of jurisdiction would label "jurisdictional" multiple provisions that this Court's precedents and the Federal Rules deem to be nonjurisdictional. His formulation of jurisdiction—which Respondents appear to endorse at least in part—is therefore incorrect.

Respondents' arguments are premised upon an incorrect understanding of jurisdiction. In contrast, Ms. Hamer, consistent with this Court's precedents, uses the term "jurisdiction" to refer only to subject-matter jurisdiction and personal jurisdiction. *E.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010).

B. Rule 4(a)(5)(C) Does Not Derive from pre-1991 § 2107 or from Any Other Statute

Respondents argue for the first time that the 30-day limit in Rule 4(a)(5)(C) derives from a statute. Resp. Br. 14-24. This argument is irreconcilable with Respondents' Brief in Opposition submitted to this Court, where Respondents admit that Rule 4(a)(5)(C) has no statutory basis. Opp. 5 (recognizing that Rule 4(a)(5)(C) is not "tied to a statutory time limitation"). It is also irreconcilable with their briefs to the Seventh Circuit, where Respondents extensively argued that Rule 4(a)(5)(C) is nonjurisdictional because it does not derive from a statute. Pet. App. 71-77. In any event, Respondents' revised argument is incorrect.

1. The History and Plain Text of the Relevant Rules and Statutes Confirm that Rule 4(a)(5)(C) Does Not Derive from Any Statute

Respondents are simply mistaken to argue that Rule 4(a)(5)(C) derives from the pre-1991 version of § 2107. As explained below, the 1991 amendments to § 2107 were designed, *inter alia*, to track: (i) part (but not all) of Rule 4(a)(5); and (ii) the 1991 addition of Rule 4(a)(6) in its entirety.

Before 1991, § 2107 provided, in relevant part, that "[t]he district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." 28 U.S.C. § 2107, ¶ 4 (1988). Therefore, this section provided

that an extension of time of no more than 30 days from the initial period was available ***only if***: (i) there has been a showing of excusable neglect; ***and*** (ii) the moving party failed to receive notice of the appealable judgment. As Respondents correctly note (Resp. Br. 15-16), this version of § 2107 had, in substance, been in effect since 1948. The version of the Federal Rules of Civil Procedure in effect at that time contained the same provision. Am. Acad. of Appellate Lawyers Br. 14.

Starting in 1966, however, the Federal Rules of Civil Procedure (and subsequently the Federal Rules of Appellate Procedure after their passage in 1967) began to diverge sharply from pre-1991 § 2107. Specifically, the Rules eliminated the requirement that excusable neglect stem from lack of notice, and permitted an extension of time to appeal, not to exceed 30 days from the initial period, simply upon a showing of excusable neglect. Am. Acad. of Appellate Lawyers Br. 15. In 1979, the Rules were amended to additionally permit an extension of time upon a showing of good cause. *Id.* at 16. Therefore, Appellate Rule 4(a)(5) provided that an extension of time could be granted if: (i) a motion is filed no later than 30 days after the expiration of the initial appeal period; and (ii) a showing of excusable neglect or good cause is made; and further provided that (iii) an extension cannot exceed the later of 30 days from the initial period or 10 days from the date of entry of the order granting the motion. *Id.* In contrast, the substance of § 2107 remained unchanged during this time, such that Rule 4(a)(5) was inconsistent with—and far less restrictive than—pre-1991 § 2107.

Although Respondents seek to downplay the 1991 amendments to § 2107, these amendments effected

major changes that greatly expanded the ability of parties to obtain additional time to appeal.

First, the 1991 amendments deleted the requirement that an extension of time could only be granted in lack-of-notice cases, and provided, in the first part of § 2107(c), for an extension of time so long as: (i) a motion for an extension is filed within 30 days of the expiration of the time otherwise allowed for appeal; and (ii) the movant shows excusable neglect or good cause. Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991). Therefore, a district court was given discretion to entertain a timely motion to extend the time to appeal upon ***any*** showing of: (i) excusable neglect (as the Federal Rules have permitted since 1966); ***or*** (ii) good cause (as the Federal Rules have permitted since 1979). Unlike pre-1991 § 2107, extensions of time were not limited only to instances where excusable neglect was coupled with lack of notice. Importantly, the first part of § 2107(c) contains ***no*** limitation whatsoever on the length of any extension, whereas the pre-1991 statute did.

Second, the 1991 amendments, in the second part of § 2107(c), separately provide that under certain conditions, the time to appeal may be reopened for 14 days if: (i) a motion to reopen is filed within 180 days of the expiration of the time otherwise set for appeal; and (ii) the movant did not receive proper notice of the appealable decision. *Id.*[3] Contrary to the pre-1991 statute, the second part of § 2107(c) ***does not*** require

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[3] Also in 1991, Federal Rule of Appellate Procedure 4(a) was amended to add Rule 4(a)(6), which contains the substance of the second part of § 2107(c).

a showing of excusable neglect. Additionally, the second part of § 2107(c) permits the time to appeal to be reopened for 14 days from the date of the district court's order granting the motion to reopen, unlike the pre-1991 statute, which did not permit the appeal period to be extended beyond 30 days from the initial deadline.

Although pre-1991 § 2107 and current Rule 4(a)(5)(C) both contain 30-day limits on extensions of time, the similarities end there. Indeed, the 1991 amendments granted statutory authorization to the more permissive extension-of-time requirements that had been added to the Rules between 1966 and 1979. Rule 4(a)(5)(C) therefore does not derive from pre-1991 § 2107, nor does any other provision of Rule 4(a)(5). Indeed, until 1991, no part of Rule 4(a)(5) was grounded in § 2107 or in any other statute. Today, only Rule 4(a)(5)(A) is grounded in a statute, specifically § 2107(c). The rest of Rule 4(a)(5) has no statutory roots.

2. The House Report Further Confirms that the Omission of Rule 4(a)(5)(C) from § 2107(c) Was Intentional

Although the text itself conclusively demonstrates that Rule 4(a)(5)(C) is not derived from pre-1991 § 2107, the House Report further illustrates this point. Specifically, the House Report states that the addition of § 2107(c) "uses language almost identical to that in ***the first sentence of current Rule 4(a)(5)***, Federal Rules of Appellate Procedure." H.R. Rep. No. 102-322, 1991 U.S.C.C.A.N. 1303, 1310 (1991) (emphasis added). In contrast, the House Report expresses an intent to adopt the entirety of Rule 4(a)(6) into § 2107(c),

explaining that "[t]he remainder of the language is almost identical to that found in proposed Rule 4(a)(6), Federal Rules of Appellate Procedure, which is scheduled to become effective on December 1, 1991." *Id.* At the time, Rule 4(a)(5) provided as follows:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

See 650 Park Ave. Corp. v. McRae, 836 F.2d 764, 766 (2d Cir. 1988) (reproducing the version of Rule 4(a)(5) that was in effect at the time of the 1991 addition of § 2107(c)).[4] Consistent with the House Report, Congress adopted the "first sentence" of Rule 4(a)(5) into § 2107(c), but ***did not*** include a 30-day limit on extensions, which appeared in ***the last sentence*** of Rule 4(a)(5) as it then existed. This legislative history

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[4] The 1979 version of Rule 4(a)(5) is reproduced because the 1991 amendments had not yet taken effect at the time of the November 18, 1991 House Report. Although Rule 4 was amended effective December 1, 1991 to add Rule 4(a)(6), this amendment made no change to Rule 4(a)(5).

demonstrates that Respondents are incorrect to assume that Congress's omission of a 30-day maximum extension in § 2107(c) was simply the result of inadvertence. To the contrary, the House Report demonstrates that Congress consciously chose which parts of Rule 4(a)(5) to include in the statute and which parts to omit. When Congress desired to adopt entire provisions of Rule 4(a) wholesale, it did so explicitly, as evidenced by its adoption, in the 1991 addition of § 2107(c), of the entirety of newly added Rule 4(a)(6).

As evidenced by this history, Respondents are simply wrong to argue that the 30-day period in Rule 4(a)(5)(C) derives from pre-1991 § 2107. To the contrary, the 1991 amendments to § 2107—titled "Conformity with Rules of Appellate Procedure"—were designed to conform the statute in certain ways to Rule 4(a). Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991).

C. Even if Rule 4(a)(5)(C) Were Seen as Deriving from pre-1991 § 2107, the Rule Would Not Be Jurisdictional

Even assuming *arguendo* that Rule 4(a)(5)(C) has a statutory basis, this does not lead to the conclusion that Rule 4(a)(5)(C) is jurisdictional. To determine whether a time limitation is jurisdictional, this Court "inquire[s] whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). This Court has repeatedly recognized that "most time bars are nonjurisdictional[,]" and that a filing deadline

should generally be considered a "'quintessential claim-processing rule[]'" that "'seek[s] to promote the orderly progress of litigation,' but do[es] not deprive a court of authority to hear a case." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Henderson*, 562 U.S. at 435). Accordingly, this Court applies a "rebuttable presumption of equitable tolling" with respect to time bars. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

Respondents' arguments violate fundamental principles of statutory interpretation. *First*, Respondents turn this Court's presumption against jurisdictionality on its head. Instead of recognizing this presumption, Respondents ask this Court to: (i) presume that the 30-day limit on extensions of time has always been jurisdictional; and (ii) therefore assume that Congress could not have intended to repeal the 30-day time limitation in the 1991 amendments to § 2107. Congress's deletion in 1991 of any reference to a 30-day maximum extension of time strongly demonstrates that Congress intended no such maximum extension in § 2107(c), let alone a jurisdictional one. Respondents point to no evidence to the contrary, and they therefore conclusively fail to rebut the presumption against jurisdictionality.

Second, instead of grappling with Congress's elimination of any maximum extension of the initial period to appeal, Respondents simply assume—contrary to the plain text of § 2107(c) and at odds with the House Report that specifically articulates which portion of Rule 4(a)(5) was being adopted into the statute—that Congress's elimination of the maximum extension time was "inadvertent[]." Resp.

Br. 1, 6. Respondents' argument violates the principle that "[w]hen Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect." *Pierce Cty. v. Guillen*, 537 U.S. 129, 145 (2003) (first alteration in original) (citation omitted). Respondents offer no support for their contention that this omission was inadvertent, and indeed, as explained in detail above, the House Report belies Respondents' argument. This Court should therefore hold, consistent with fundamental principles of statutory interpretation, that Rule 4(a)(5)(C) is nonjurisdictional.

D. Interpreting the 30-day Limit in Rule 4(a)(5)(C) as Jurisdictional Would Be Inconsistent with the Rest of the Rule

A finding that the 30-day limit in Rule 4(a)(5)(C) is jurisdictional would be incongruous with the Rule as a whole, which permits extensions until the later of: (i) 30 days after the initial deadline to appeal; or (ii) 14 days after the district court enters the order granting an extension of time. Although Respondents now contend that the 30-day limit in Rule 4(a)(5)(C) has a statutory basis, Respondents do not argue that the 14-day limit has such a basis. Nor could they, because the 14-day limit first appeared in Rule 4(a)(5)(C) in 2009 and has never appeared in a statute.[5] Therefore, Respondents appear to concede that the 14-day limit is nonjurisdictional. Thus, if Respondents' view were adopted, parties like Ms. Hamer would be subject to a

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[5] The second part of § 2107(c) provides for a 14-day period for a district court to reopen the time to appeal in lack-of-notice cases, but this provision corresponds to Rule 4(a)(6), not Rule 4(a)(5)(C).

30-day jurisdictional limitation simply because they filed their motion early and the district court promptly decided the motion. In sharp contrast, if: (i) the party seeking the extension waits until close to the statutory deadline (i.e., 30 days after the expiration of the initial time to appeal as per the first part of § 2107(c)) before filing the motion for an extension; or (ii) the district court does not promptly decide the motion for an extension, the movant would be subject to a 14-day *non*jurisdictional period to file a notice of appeal.

Nothing in the Rules (much less in any statute) offers any support for making the jurisdictionality of Rule 4(a)(5)(C) hinge upon the precise timing of the party's motion during the statutorily prescribed period for moving for an extension. Nor is there any support for the jurisdictionality determination depending upon the timing of the district court's order granting an extension. The inconsistency that would flow from the adoption of Respondents' position further shows that the 30-day period in Rule 4(a)(5)(C) is nonjurisdictional.

II. Respondents Forfeited and Waived the Right to Invoke Rule 4(a)(5)(C)

Respondents do not dispute that if Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, the Rule is subject to forfeiture and waiver by an appellee. However, they argue that neither forfeiture nor waiver occurred here. Resp. Br. 32-38. Respondents are incorrect.

Respondents (and the Seventh Circuit) recognize that Ms. Hamer alleged waiver and forfeiture to the Seventh Circuit. Resp. Br. 33; Pet. App. 3-4. However,

Respondents claim that Ms. Hamer failed to raise some of the specific waiver and forfeiture theories argued here, and should therefore be prohibited from alleging that Respondents committed any specific acts of waiver or forfeiture. Resp. Br. 33. Respondents' argument, which does not appear in their Brief in Opposition (*see* Sup. Ct. R. 15.2), lacks merit. Ms. Hamer appeared *pro se* at the Seventh Circuit, and it is well-established that "[a] document filed *pro se* is to be liberally construed[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks omitted). Moreover, this Court's "traditional rule is that [o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original) (internal quotation marks omitted). Because Ms. Hamer argued to the Seventh Circuit that Respondents waived and forfeited their right to seek dismissal based on Rule 4(a)(5)(C), her arguments here are entirely proper.

A. Respondents Committed Forfeiture by Failing to Raise Any Objection to the District Court

Respondents do not seriously dispute that a party is ordinarily prohibited from raising an issue on appeal without first raising it to the district court, or that during the two months that the case remained before the district court after the order granting the extension of time, they did not object to the extension. Rather, Respondents argue that there was no forfeiture because the Local Rules of the Northern District of Illinois do not deem the absence of a response to be a

waiver. Resp. Br. 33-34. But the Local Rules do not govern what constitutes forfeiture on appeal; rather, these Rules only govern proceedings in the district court. Fed. R. Civ. P. 83(a)(1) (providing that "a district court . . . may adopt and amend rules governing *its* practice") (emphasis added). The Local Rules do not purport to alter the longstanding rule of appellate practice—discussed in detail in Ms. Hamer's opening brief (Pet. Br. 21-22)—that on appeal a party may not inject new issues into a case for the first time.

B. Respondents Committed Forfeiture by Failing to Appeal or Cross-Appeal

Because Respondents seek a determination that the district court's extension of time was improper, an appeal or a cross-appeal is required to preserve the point. Respondents are wrong to suggest that: (i) they were not in a position to appeal the extension at the time it was granted (Resp. Br. 34), and (ii) a cross-appeal was not required because they were not attacking the district court's disposition of the underlying discrimination and retaliation claims (Resp. Br. 35). The first argument ignores that when the district court entered the order extending Ms. Hamer's time to appeal, Respondents had all of the information they needed to allege that this extension violated Rule 4(a)(5)(C). And the second argument ignores that it is the district court's extension, and not the summary-judgment order, that would form the basis for Respondents to appeal or cross-appeal. Therefore, Respondents were required to notice an appeal or a cross-appeal in order to challenge the district court's extension of time. Moreover, contrary to Respondents' argument (Resp. Br. 35 n.15), the cross-appeal rule

stems from this Court's precedents dating back nearly a century. Pet. Br. 23-24. Therefore, it is entirely proper for this Court to address whether, consistent with these precedents, a cross-appeal was required here.

C. Respondents Committed Forfeiture and Waiver Through Their Statements to the Seventh Circuit

Respondents make much of the fact that their statements that Ms. Hamer's appeal was timely were made in a docketing statement, and therefore Respondents conclude that these statements are meaningless and of no effect. Resp. Br. 35-38. But Respondents' cited authority stands for little more than the uncontroversial proposition that a party may generally raise issues on appeal even if those issues were not specifically included in the docketing statement. Respondents' statements, however, are not merely omissions; they are affirmative statements that the appeal was timely noticed. Pet. App. 63-64. Respondents are further incorrect to argue that these statements were merely made to address jurisdiction. Resp. Br. 36. Contrary to Respondents' suggestion, Respondents' second statement that the appeal was timely is not tied to jurisdiction at all. Pet. App. 64. In any event, Respondents unambiguously stated their view that the appeal was timely, and they therefore waived their right to argue otherwise. Indeed, Respondents' clear statements constitute "a judicial admission . . . [which] is conclusive in the case." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 678 (2010) (citation omitted).

III. Equitable Considerations Are Properly Taken Into Account, and They Preclude Dismissal of the Appeal Here

Although Respondents emphasize that the Rules circumscribe district courts' discretion to extend the time to appeal, Respondents miss the point. The question here is ***not*** whether it was proper for the district court to extend the time to appeal for the length of time that it did. Rather, the question is whether, assuming that the district court's extension contravened the Rules, equitable considerations can excuse the violation and permit the appeal to be decided on the merits. As discussed above, Respondents fail to rebut the presumption that Rule 4(a)(5)(C), as a time limitation, is a claim-processing rule that is subject to equitable considerations. Federal statutes and the Federal Rules are inconsistent with Respondents' argument that Rule 4(a)(5)(C) is insusceptible to equitable considerations.

A. Recognition of Equitable Considerations Is Consistent with Federal Statutes

Respondents argue that the Rule should be presumed not to allow equitable considerations based on this Court's past treatment of statutory time limits for notices of appeal. Resp. Br. 29. But Respondents ignore the most pertinent statute: the first part of § 2107(c), which was enacted in 1991. It permits an extension of time to appeal upon showing the equitable considerations of excusable neglect or good cause and does not set a maximum extension. A proper analysis must fully account for this statute, which significantly relaxes the former statute's hostility toward extensions of time to appeal. As Ms. Hamer argued (Pet. Br. 38),

a holding that equitable considerations cannot apply to Rule 4(a)(5)(C) would be inconsistent with the very equitable considerations that § 2107(c) invokes. Respondents do not answer this argument.

Respondents misunderstand Ms. Hamer's discussion (Pet. Br. 40) of the harmless-error statute and associated Federal Rule. Contrary to Respondents' suggestion (Resp. Br. 29), Ms. Hamer is not arguing that harmless error alone is sufficient to excuse noncompliance with Rule 4(a)(5)(C). Rather, Ms. Hamer merely notes that recognition of equitable considerations with respect to Rule 4(a)(5)(C) is consistent with the harmless-error statute, which precludes reversal of a district court's order where an error is harmless. 28 U.S.C. § 2111. Unlike the claim-processing rule at issue in *Manrique v. United States*, 137 S. Ct. 1266 (2017), an appellate court's enforcement of Rule 4(a)(5)(C) will necessarily result in a reversal of a district court's extension of time. Nothing in *Manrique* precludes looking to the harmless-error statute, or any other statute, to determine whether equitable considerations can be taken into account with respect to a particular claim-processing rule.

B. Recognition of Equitable Considerations Is Consistent with the Federal Rules

Respondents' arguments that the Rules of Appellate Procedure preclude equitable considerations are incorrect.

First, Respondents wrongly reason that because Rule 3(a)(2) states that failures other than the timely filing of a notice of appeal do not affect the validity of

the appeal, then failing to file a notice of appeal necessarily ***does*** affect the validity of the appeal. Resp. Br. 12-13. As an initial matter, this argument commits an error of logic: It affirms the consequent. Nothing in Rule 3(a)(2) suggests that a violation of a nonstatutory time limitation automatically affects the validity of an appeal. Additionally, nothing else that Respondents cite supports a holding that Rule 4(a)(5)(C) is insusceptible to equitable considerations. For instance, this Court held that a statutory time limitation was subject to equitable tolling even though the limitation stated that an untimely action would be "forever barred." *Wong*, 135 S. Ct. at 1629. If such an emphatic time limitation is subject to equitable considerations, then surely the portions of the Rules that Respondents cite do not rebut the presumption that equitable considerations should be taken into account.

Second, this Court's cases demonstrate that the Federal Rules do not preclude equitable considerations. For instance, although Rule 3 requires a "notice of appeal" in order to seek appellate review of a district-court decision and sets forth specific requirements for the notice, this Court held that a document that does not strictly comply with Rule 3 (such as a brief filed in lieu of a proper notice of appeal) can sometimes suffice. *Smith v. Barry*, 502 U.S. 244, 248-50 (1992); *see also Becker v. Montgomery*, 532 U.S. 757, 768 (2001) (concluding that an appellant's failure, in violation of the Rules, to sign a notice of appeal was not fatal to the appeal, and that the court of appeals should have accepted the corrected notice of appeal).

Third, relying on *Manrique*, Respondents incorrectly allege that the time limitation in Rule

4(a)(5)(C) is insusceptible to equitable considerations because the Rule is "unalterable." Resp. Br. 25. But this language is taken from *Kontrick*, which specifically leaves open the possibility that claim-processing rules "could be softened on equitable grounds." *Kontrick*, 540 U.S. at 456-57.[6] Therefore, this language does not suggest that claim-processing rules are automatically insusceptible to equitable considerations.

C. The Unique-Circumstances Doctrine Precludes the Dismissal of Ms. Hamer's Appeal

Respondents do not dispute that the facts of this case fall squarely within the unique-circumstances doctrine as originally set forth in *Harris Truck Lines* and *Thompson*. Nor do Respondents ask the Court to overrule these cases as applied to nonjurisdictional rules. Instead, they cite to some court-of-appeals cases that hold, contrary to this Court's precedents, that the unique-circumstances doctrine only applies to ambiguous timing provisions. Resp. Br. 31-32. But Respondents' cited cases are flatly inconsistent with this Court's cases that have applied the doctrine. For instance, the Court in *Harris Truck Lines* applied the unique-circumstances doctrine where the statute and Rule unambiguously only permitted an extension of time upon a showing of excusable neglect coupled with lack of notice, and the appellant: (i) received proper notice of the underlying decision; yet (ii) through its counsel, sought an extension of time that was

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[6] Because the Court in *Kontrick* determined that forfeiture had occurred, the Court had no occasion to determine the applicability of equitable considerations to the rule in question. *Id.*

prohibited by Rule and by statute. Pet. Br. 30-31. Similarly, the Court in *Thompson* applied the doctrine despite a violation of an unambiguous Rule setting the deadline for filing post-trial motions. *Thompson*, 375 U.S. at 386. Here, Ms. Hamer's counsel successfully sought an extension in the context of seeking to withdraw from the representation. Pet. App. 57-59. And the Seventh Circuit recognized that Ms. Hamer was misled by the district court's order. Pet. App. 4. The Court therefore should follow its longstanding precedents and conclude that the unique-circumstances doctrine bars the dismissal of Ms. Hamer's appeal.

CONCLUSION

The judgment of the Seventh Circuit should be reversed, and the case should be remanded to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

Respectfully submitted,

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RECORD AND BRIEFS

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CHARMAINE HAMER,

Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

BRIEF OF AMICUS CURIAE THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER 1

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

1. 28 U.S.C. § 2107 Does Not Limit Extensions Granted When the Appellant Moves Within the Initial Period 5

2. Rule 4(a)(5)(C) Imposes a Nonstatutory Limit on Initial Period Extensions, of Which Ms. Hamer Ran Afoul 6

3. Missing a Court-Rule Deadline Should Not Deprive an Appellate Court of Jurisdiction Unless the Rule Is Congruent with a Statute 7

3.1. Federal Courts Should Not Forfeit Jurisdiction 7

3.2. The Court Should Not Endorse a Trap for the Unwary 8

3.3. As a Claim-Processing Rule, Rule 4(a)(5)(C) Carries Potent Force 10

TABLE OF CONTENTS – Continued

Page

3.4. When No Party Objected and the Appellant Relied on a Federal Judge's Order, Enforcing a Rule as Jurisdictional Is Unseemly 11

4. History of the Law of Extensions Teaches Useful Lessons 12

4.1. Historical Highlights 12

4.2. Lessons of History 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 9

Barnes v. Cavazos, 966 F.2d 1056 (6th Cir. 1992) 11

Bowles v. Russell, 551 U.S. 205 (2007) 7

Crown Coat Front Co. v. United States, 386 U.S. 503 (1967) 8

Darby v. Cisneros, 509 U.S. 137 (1993) 8

Florentine v. Barton, 69 U.S. (2 Wall.) 210 (1864) 8

Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001) 10

Hill v. Hawes, 320 U.S. 520 (1944) 4, 13, 14, 18

Infante v. City of Hastings, 668 F. App'x 687 (8th Cir. 2016) 11

Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 9

Kontrick v. Ryan, 540 U.S. 443 (2004) 7

Manrique v. United States, 137 S. Ct. 1266 (2017) 10

Massachusetts v. Mellon, 262 U.S. 447 (1923) 8

McClellan v. Carland, 217 U.S. 268 (1910) 7

McGarr v. United States, 736 F.2d 912 (3d Cir. 1984) 10

Meek v. Metro. Dade Cty., 908 F.2d 1540 (11th Cir. 1990) 11

TABLE OF AUTHORITIES – Continued

Page

Nat'l Indus. Inc. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258 (9th Cir. 1982) 11

Offutt v. United States, 348 U.S. 11 (1954) 4, 12

Redfield v. Cont'l Cas. Corp., 818 F.2d 596 (7th Cir. 1987) 11

Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355 (2d Cir. 2003) 10

Stotter v. Univ. of Tex. at San Antonio, 508 F.3d 812 (5th Cir. 2007) 11

Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530 (4th Cir. 1996) 11

United States v. Torres, 372 F.3d 1159 (10th Cir. 2004) 11

Washington v. Ryan, 833 F.3d 1087 (9th Cir. 2016) 18

Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015) 4, 12

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 8

Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012) 7, 8

Zurich Ins. Co. v. Wheeler, 838 F.2d 338 (9th Cir. 1988) 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1291 5
28 U.S.C. § 1295 5
28 U.S.C. § 2071 (Supp. II 1948) 15
28 U.S.C. § 2107 ..... 3, 5, 6, 16, 17, 19
28 U.S.C. § 2107 (Supp. II 1948) 15
28 U.S.C. § 227 (1934) 13
28 U.S.C. § 227a (1934) 13
28 U.S.C. § 230 (1934) 13
Pub. L. No. 73-415, 48 Stat. 1064 (1934) 12
Pub. L. No. 80-773, 62 Stat. 869 (1948) 15
Pub. L. No. 89-773 § 1, 80 Stat. 1323 (1966) 15
Pub. L. No. 100-702, title IV, § 401(a), 102 Stat. 4648 (1988) 13
Pub. L. No. 101-650, title III, §§ 315, 321(a)(1), 104 Stat. 5115, 5117 (1990) 13
Pub. L. No. 102-198 § 12, 105 Stat. 1627 (1991) 16
Pub. L. No. 111-16 § 6(3), 123 Stat. 1608 (2009) 17
Pub. L. No. 112-62 § 3, 125 Stat. 757 (2011) 17
Rules Enabling Act of 1934, 28 U.S.C. § 2072 ..... 4, 12, 13, 15, 19

TABLE OF AUTHORITIES – Continued

Page

RULES

Amendments to Fed. R. App. P., 441 U.S. 969 (1979) 16, 18

Amendments to Fed. R. App. P., 500 U.S. 1007 (1991) 17

Amendments to Fed. R. App. P., 523 U.S. 1147 (1998) 17

Amendments to Fed. R. App. P., 535 U.S. 1123 (2002) 17

Amendments to Fed. R. App. P., 556 U.S. 1291 (2009) 18

Amendments to Fed. R. Civ. P., 329 U.S. 839 (1946) 14, 18

Amendments to Rules of Civil Procedure, 383 U.S. 1029 (1966) 15

Fed. R. App P., 389 U.S. 1063 (1967) 15, 16

Fed. R. App. P. 4(a) 5, 6, 15, 16, 17

Fed. R. App. P. 4(a)(5)(C) 3, 4, 6, 10, 19

Fed. R. Civ. P. 60 ..... 13, 14

Fed. R. Civ. P. 73 (1939) 13

Fed. R. Civ. P. 73 (1946) 14

Fed. R. Civ. P. 73 (1966) 15

Fed. R. Civ. P. 77 (1946) 14

Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645 (1939) 13

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 37.3 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Fed. R. App. P. 4, advisory committee's note to 1998 amendment to subdivision (a)(5)(A)(ii) 17

Fed. R. Civ. P. 77, advisory committee's note to 1946 amendment 14

Reviser's Note, 28 U.S.C. § 2071 (Supp. II 1948) 15

BRIEF OF AMICUS CURIAE THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER

The American Academy of Appellate Lawyers submits this brief as amicus curiae in support of petitioner.[1]

INTEREST OF THE AMICUS CURIAE

The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts. The Academy is dedicated to the enhancement of the standards of appellate practice and the

[1] The parties to the action have consented in writing to the filing of amicus briefs pursuant to Rule 37.3(a) of the rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by Fellows of the Academy, and was produced and funded exclusively by the Academy or its counsel. No party or counsel for a party was involved in preparing this brief or made a monetary contribution intended to fund the preparation or submission. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation. Positions taken in amicus briefs state views determined by the Academy's internal process, were not specifically approved by individual Fellows, and should not be attributed to individual Fellows, their places of work, or their clients. Not all Fellows support amicus participation in principle.

administration of justice, and to the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only, and the Academy has 295 active members, known as Fellows. The activities of the Academy are supported entirely by the dues, program fees, and initiation fees paid by the Fellows.

By publishing newsletters and reports, conducting retreats and conferences, teaching appellate courses and seminars, and establishing a network of appellate practitioners and scholars, the Academy brings together the leading attorneys in the nation who devote their practices and teaching to appellate decisionmaking and the administration of justice on appeal. The Academy has submitted its views to Congress on legislative changes affecting appellate practice and has helped organize, chair, and administer a national conference on the functioning of the appellate courts. In pursuit of its mission, the Academy has submitted comments and testified to the Advisory Committee on Rules of Appellate Procedure, and has previously filed amicus curiae briefs in this Court.[2]

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[2] Brief *Amicus Curiae* of the American Academy of Appellate Lawyers in Support of the Petition for a Writ of Certiorari, *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004); Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); Brief of the Amicus Curiae on Behalf of the American Academy of Appellate Lawyers in Support of Petitioner, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

Matters of appellate jurisdiction are of almost daily concern to Fellows, who often advise clients and referring trial counsel about the extension rules at issue here. Also, Fellows observe the operation of the rules as part of the administration of justice in their own cases and as part of the study essential to maintaining professional ability and standing in appellate practice. Appellate justice and sustaining popular respect for the appellate process are prime concerns of the Academy as an institution and of its Fellows as officers of courts and as citizens.

SUMMARY OF ARGUMENT

Parts 1 and 2 describe the environment in which the Academy hopes to help the Court navigate. When a district court receives a motion to extend the time to appeal in a civil case no later than 30 days after the initial deadline to appeal, 28 U.S.C. § 2107 does not limit the length of the extension the court may grant. Fed. R. App. P. 4(a)(5)(C) ("Rule 4(a)(5)(C)") limits the length of the extension to 30 days after the initial deadline or 14 days after the order granting it, whichever is longer.

In part 3, the Academy pools its collective experience to explain why the length limits in Rule 4(a)(5)(C) should not be held jurisdictional. First, forfeiting congressionally granted jurisdiction by rule would be a dangerous precedent for the Judicial Branch. Second, making the rule jurisdictional when Congress has not

done so would lay a trap for the unwary, a trap most likely to ensnare pro se litigants like Ms. Hamer. Third, properly treated as a mandatory claim-processing rule, Rule 4(a)(5)(C) achieves its underlying purpose of finality because district courts must follow it when appellees invoke it, and appellants could not tolerate the risk of dismissal incurred by relying on a district court's erroneous failure to follow it. Finally, dismissing an appeal when Congress, the appellee, and a district judge considered it timely offends the appearance of justice and invites disrespect of the judiciary. *See Offutt v. United States*, 348 U.S. 11, 14 (1954); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

Part 4 collects the history of the relevant statutes and rules, leading to two lessons of history. First, judicial precedent is a poor vehicle to reconsider the virtues of discretionary extensions of time to appeal. Discretionary extensions arise from *Hill v. Hawes*, 320 U.S. 520, 521 (1944). At first, they reflected sympathy for the litigant who received no notice of entry of a judgment at a time when court dockets could be difficult to access. Although the spur for them has dulled, discretionary extensions have thrived in both statute and rule. Case law should not thwart them. Second, the Rules Enabling Act of 1934, 28 U.S.C. § 2072, which authorizes Rule 4(a)(5)(C), does not address whether its length limits are or may be jurisdictional. That statute should not affect the Court's decision.

ARGUMENT

1. 28 U.S.C. § 2107 Does Not Limit Extensions Granted When the Appellant Moves Within the Initial Period.

Principally in 28 U.S.C. §§ 1291 and 1295, Congress granted the courts of appeals subject matter jurisdiction over appeals from final decisions of district courts of the United States and certain territories. In 28 U.S.C. § 2107, Congress revoked jurisdiction over appeals in civil cases noticed outside the periods specified in that statute. Those periods are 30 days from entry of the appealable document in most cases, § 2107(a), and 60 days from entry of the appealable decision when the United States or certain of its agents are parties to the case, § 2107(b). These deadlines are copied in Fed. R. App. P. 4(a)(1) ("Rule 4(a)" substitutes for the full title hereafter).

In the first sentence of 28 U.S.C. § 2107(c), Congress granted district courts discretion to extend the deadlines of subsections (a) and (b) when a prospective appellant moves for an extension no later than 30 days after the applicable deadline. We refer to these extensions as "initial period" extensions. Congress did not limit the length of initial period extensions district courts may grant.

In the remainder of 28 U.S.C. § 2107(c), Congress granted district courts discretion to extend the 30-day and 60-day deadlines when a party was entitled to notice of entry of the appealable decision but did not receive that notice within 21 days of entry. We call these

extensions "notice failure" extensions. Congress enacted two time limits for notice failure extensions: (i) the prospective appellant must move for the extension within 180 days of entry of the appealable decision or 14 days of receiving notice of it, whichever is earlier; and (ii) the order may extend the deadline no more than 14 days from its own entry. The respective sentences for initial period extensions and notice failure extensions are self-contained. There can be no textual argument that the time limits for notice failure extensions apply to initial period extensions.

2. Rule 4(a)(5)(C) Imposes a Nonstatutory Limit on Initial Period Extensions, of Which Ms. Hamer Ran Afoul.

Rule 4(a)(5)(A) mimics 28 U.S.C. § 2107(c) in stating district courts' discretionary authority to grant initial period extensions. But Rule 4(a)(5)(C) limits the length of extensions to 30 days after the applicable deadline or 14 days after entry of the extension order, whichever is later. Neither 28 U.S.C. § 2107 nor any other statute limits district courts' power and discretion over the length of an initial period extension.

Here, the district court granted an initial period extension longer than allowed by Rule 4(a)(5)(C). Ms. Hamer filed her notice of appeal within the time allowed by the order but outside the time allowed by the rule. The appellee did not object and is not prejudiced by the delay. The issue is whether this rule violation by

the district court and Ms. Hamer deprives the court of appeals of jurisdiction.

3. Missing a Court-Rule Deadline Should Not Deprive an Appellate Court of Jurisdiction Unless the Rule Is Congruent with a Statute.

The Academy takes as a principle – and endorses the principle – that only Congress can limit the subject matter jurisdiction Congress granted to the courts of appeals. *Bowles v. Russell*, 551 U.S. 205, 211 (2007); *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004).

3.1 Federal Courts Should Not Forfeit Jurisdiction.

A federal court's error of refusing to exercise its jurisdiction is so serious that a court of appeals or this Court may issue a writ to compel the lower court to exercise its jurisdiction. *McClellan v. Carland*, 217 U.S. 268, 280 (1910). In *McClellan*, a court of appeals erred in allowing a trial court to abandon federal jurisdiction by staying the case in deference to state proceedings. *Id.* at 280-81. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012).

The Academy has found no precedent for the Judicial Branch to refuse wholesale to exercise jurisdiction over justiciable disputes within federal subject matter jurisdiction. Valuable doctrines can justify refusing on

a case-by-case basis to exercise jurisdiction; for example, separation of powers justifies declining to adjudicate abstract political questions. *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); *see Zivotofsky v. Clinton*, 566 U.S. at 196-97 (question not political). But no doctrine justifies forfeiting statutory appellate jurisdiction. Forfeiture, even by making appellate jurisdiction depend on a party's compliance with a court rule, would set a precedent of unknowable hazard to the Judicial Branch.

3.2 The Court Should Not Endorse a Trap for the Unwary.

A rule declaring a jurisdictional deadline not authorized by statute is a classic trap for the unwary. The Court has long condemned procedural traps. *Florentine v. Barton*, 69 U.S. (2 Wall.) 210, 216 (1864); *Crown Coat Front Co. v. United States*, 386 U.S. 503, 515 (1967); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346 (1971); *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Lawyers who do not specialize in appellate practice, their clients, and self-represented parties are likely to believe they can trust district courts' orders. They reasonably rely on procedural directions given in those orders. District judges presented with unopposed procedural orders within the court's statutory power are likely to grant them with the best of intentions and without doing original research.

This trap disproportionately ensnares pro se plaintiffs. Ms. Hamer is an unsuccessful plaintiff

whose appointed lawyer withdrew when she lost a dispositive motion. Many plaintiffs with tort or statutory claims can engage counsel only by contingent fee agreements. Contingent fee agreements often exclude services related to appeals. When a contingent fee case miscarries, the plaintiff loses the case and representation at the same time. Lost contingent fee cases are difficult for appellate lawyers to undertake because the client cannot afford to pay cash, and generating cash from the claim requires some other lawyer to prevail at trial after the appellate lawyer gains a reversal of the initial defeat. These cases are neither more nor less likely than others to raise meritorious issues on appeal; the trap serves no legitimate governmental purpose.

This trap is worse than most because it encourages morally reprehensible behavior. As the court of appeals pointed out, neither forfeiture, waiver, nor estoppel can overcome a defect in subject matter jurisdiction. *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (waiver and forfeiture); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). So if the rule is jurisdictional, an appellee faced with a motion that asks for too long an extension optimizes the chance to avoid the appeal by remaining silent – even encouraging a grant – and hoping the deceived appellant misses the deadline.

3.3 As a Claim-Processing Rule, Rule 4(a)(5)(C) Carries Potent Force.

The Academy is unaware of any need served by treating Rule 4(a)(5)(C) as jurisdictional. It is rarely invoked; when it is, district judges normally set deadlines complying with its time limit. An appellee may easily object to an extension exceeding the rule's deadlines.

Rule 4(a)(5)(C) should be construed as a mandatory claim-processing rule. "Mandatory claim-processing rules 'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017). "Unlike jurisdictional rules, mandatory claim-processing rules may be forfeited 'if the party asserting the rule waits too long to raise the point.'" *Id.*

Treated as a claim-processing rule, Rule 4(a)(5)(C) fully serves its underlying policy of finality. First, if the appellee raises it, the district court must enforce it. "If a party 'properly raise[s] [a mandatory claim-processing rule]'" it is "'unalterable.'" *Manrique*, 137 S. Ct. at 1272. Were a district court to ignore the rule after it is invoked, the rule would be self-enforcing. The courts of appeals unanimously hold the abuse of discretion standard applies to review of extension orders.[3]

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[3] *Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 3-4 (1st Cir. 2001) (interpretation of rule is reviewed de novo; application is reviewed for abuse of discretion); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 362 (2d Cir. 2003); *McGarr v. United States*, 736 F.2d 912, 919

An appellant who files a notice of appeal after the invoked rule's deadline expires therefore faces sure dismissal because the district court by definition abused its discretion when it ordered an excessive extension. Appellants put on notice of the risk by appellees' objections will not take the risk, so the policy of finality is enforced.

When an appellee does not object to an extension, the policy's importance ebbs. Neither the federal courts nor appellees who acquiesce in extensions have an interest in finality that justifies infusing a claim-processing rule with jurisdictional strength.

3.4 When No Party Objected and the Appellant Relied on a Federal Judge's Order, Enforcing a Rule as Jurisdictional Is Unseemly.

When Congress, the presiding federal judge, and all parties to the case agree a party can have a 40-day extension of time, enforcing a judge-made rule to deprive a party of access to the appellate court invites disrespect of the judiciary. Ordinary citizens observing

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(3d Cir. 1984); *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007); *Barnes v. Cavazos*, 966 F.2d 1056, 1061 (6th Cir. 1992); *Redfield v. Cont'l Cas. Corp.*, 818 F.2d 596, 602 (7th Cir. 1987); *Infante v. City of Hastings*, 668 F. App'x 687, 688 (8th Cir. 2016); *Nat'l Indus. Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1264 (9th Cir. 1982); *United States v. Torres*, 372 F.3d 1159, 1161 (10th Cir. 2004); *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1544 (11th Cir. 1990).

their justice system would not understand such a ruling. Ordinary citizens ejected from court reasonably could conclude lawyers and judges took advantage of them, and the rules are unfair. Treating the rule here as jurisdictional defies the need to deliver both justice and the appearance of justice. *See Offutt v. United States*, 348 U.S. at 14; *Williams-Yulee v. Fla. Bar*, 135 S. Ct. at 1666.

4. History of the Law of Extensions Teaches Useful Lessons.

This part surveys the history of the relevant statutes and rules to help answer two questions. First, should the development of the current regime influence a view favorable to the Seventh Circuit's holding? It should not. Second, does the Rules Enabling Act of 1934, 28 U.S.C. § 2072, influence this case? It should not.

4.1 Historical Highlights.

By the original Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934), Congress authorized the Court "to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." On the effective date of a validly

adopted rule, "all laws in conflict therewith shall be of no further force or effect."[4]

Acting on that authority, the Court adopted the Federal Rules of Civil Procedure. Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 647, 653 ff. (1939). Among those rules, Fed. R. Civ. P. 73(a) provided: "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal." *Id.* at 749. Statutes prescribed many times. *See, e.g.*, 28 U.S.C. §§ 227 (1934) (30 days for interlocutory injunctions; 15 days for certain interlocutory admiralty orders), 227a (1934) (30 days for final patent infringement decrees), and 230 (1934) (three months for most final judgments and decrees).

Local rules for the District of Columbia required a civil appellant to commence an appeal within 20 days of entry of the appealable judgment. *Hill v. Hawes*, 320 U.S. at 521. Faced with an appellant who missed the deadline because the court clerk neglected to give notice of entry, a district judge vacated and reentered the judgment. *Id.* at 521-22. "It goes without saying that the District Court could not extend the period fixed by [the rule]." *Id.* at 523. But the Court endorsed the reentry procedure by analogy to relief under Fed. R. Civ. P. 60 from a judgment entered against a party

[4] The supersession sentence has remained in the Rules Enabling Act of 1934 except for a two-year period. Pub. L. No. 100-702, title IV, § 401(a), 102 Stat. 4648 (1988); Pub. L. No. 101-650, title III, §§ 315, 321(a)(1), 104 Stat. 5115, 5117 (1990).

through its mistake, inadvertence, surprise, or excusable neglect. *Id.* at 523-24. Finality of a civil judgment thus depended on a district judge's intelligent use of a power to reopen that might be limited only by analogy to Fed. R. Civ. P. 60.

The Court functionally overruled itself by rule amendments. Amendments to Fed. R. Civ. P., 329 U.S. 839, 866-67, 871-72 (1946); *see* Fed. R. Civ. P. 77, advisory committee's note to 1946 amendment. By amendment to Fed. R. Civ. P. 77(d), it provided that lack of notice of entry of a judgment did not relieve a party of failing to appeal timely, or authorize a court to do so, "except as permitted in Rule 73(a)." *Id.* at 872. In Rule 73, the Court promulgated the first general time limits to file appeals – the enduring 30/60-day regime. Amendments, 329 U.S. at 866-67.[5] As an exception to the deadlines, it perpetuated but limited the sympathetic response to the losing party who does not receive notice of entry: "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." Amendments, 329 U.S. at 867. Congress followed suit, adopting the 30/60-day regime and the limited power

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[5] "When an appeal is permitted by law from a district court to a circuit court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry. . . ."

of extension when it revised the entire Judicial Code.[6] Pub. L. No. 80-773, 62 Stat. 869 (1948); 28 U.S.C. § 2107 (Supp. II 1948). The same legislation moved the Rules Enabling Act of 1934 to 28 U.S.C. § 2072 (Supp. II 1948), but retained the limit of authority to rules for district courts.[7]

In 1966, Congress amended the Rules Enabling Act of 1934 to authorize rules for the courts of appeals. Pub. L. No. 89-773 § 1, 80 Stat. 1323 (1966). The Court amended Fed. R. Civ. P. 73(a) to delete the requirement that excusable neglect be based on lack of notice of entry. Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1059-60 (1966).[8]

The Federal Rules of Appellate Procedure arrived in 1967. Fed. R. App P., 389 U.S. 1063, 1067 (1967).

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[6] "The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusible (sic) neglect based on failure of a party to learn of the entry of the judgment, order or decree."

[7] The preceding section authorized all courts "established pursuant to an Act of Congress" to make for themselves rules consistent with statute and "rules prescribed by the Supreme Court." 28 U.S.C. § 2071 (Supp. II 1948). That statute consolidated multiple former authorizations. Reviser's Note, 28 U.S.C. § 2071 (Supp. II 1948).

[8] "[U]pon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed. . . ."

They incorporated the former time limits and excusable neglect extension without material change.[9] Rule 4(a), *id.* at 1071.

In 1979, the Court restructured Rule 4(a) to have subdivisions and introduced the concept of good cause to district courts' discretion to extend the time to appeal. Amendments to Fed. R. App. P., 441 U.S. 969, 975 (1979). Rule 4(a)(5) then provided: "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Later, it addressed time: "No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later." *Id.* at 975.

Congress in 1991 restructured 28 U.S.C. § 2107 into its current form. Pub. L. No. 102-198 § 12, 105 Stat. 1627 (1991). Subsection (c) stated:

> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of

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[9] "Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

> excusable neglect or good cause. In addition, if the district court finds –
>
> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.[10]

Parallel with the statutory change, the Court added new subdivision (6) to Rule 4(a), identical in material text to the second sentence of 28 U.S.C. § 2107(c). Amendments to Fed. R. App. P., 500 U.S. 1007, 1011 (1991).

In 1998, the Court introduced lower-level subdivisions to Rule 4(a)(5) without substantive change. Amendments to Fed. R. App. P., 523 U.S. 1147, 1159-60 (1998). A 2002 amendment to Rule 4(a)(5)(A)(ii) emphasized the former plain meaning of the text because case law reflected confusion and misunderstanding. Amendments to Fed. R. App. P., 535 U.S. 1123, 1128 (2002); Fed. R. App. P. 4, advisory committee's note to

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[10] The phrase "within 7 days" later became "within 14 days." Pub. L. No. 111-16 § 6(3), 123 Stat. 1608 (2009). The only other amendment to the section did not affect subsection (c). Pub. L. No. 112-62 § 3, 125 Stat. 757 (2011).

1998 amendment to subdivision (a)(5)(A)(ii). A 2009 amendment changed "within 10 days" to "within 14 days." Amendments to Fed. R. App. P., 556 U.S. 1291, 1296 (2009).

4.2 Lessons of History.

Extensions of time for excusable neglect derive from a 1944 decision of this Court, *Hill v. Hawes*, 320 U.S. 520. As to process, the Court quickly overruled itself in its rule-making role, adopting better means to achieve the same result, Amendments, 329 U.S. at 866-67, 871-72.[11] Authority for extensions comes from a time when dockets were kept in pen and ink, and records could be reviewed only at the courthouse. But grounds for extensions expanded in 1979 when monitoring dockets was easier. Amendments, 441 U.S. at 975. And authority for extensions has persisted into the era of electronic filing and PACER. This history teaches that the Court's precedent should treat extensions to appeal with the same respect afforded them in rulemaking. The scope of discretionary extensions should not be humbled, eroded, or negated by case law making a rule of convenience jurisdictional. Legal scholarship should not be required to understand and comply with jurisdictional procedure.

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[11] Not all courts understand the message. *See Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th Cir. 1988); *Washington v. Ryan*, 833 F.3d 1087, 1098 (9th Cir. 2016).

Some may ask whether the supersession clause of the Rules Enabling Act of 1934, 28 U.S.C. § 2072(c), should influence this case. It should not. If the question were whether Rule 4(a)(5)(C) validly provides a time limit when 28 U.S.C. § 2107 contains none, the Rules Enabling Act would answer it. But the question is whether the indubitably valid limit has jurisdictional effect or is a claim-processing rule, and the Act does not speak to that question. Assuming arguendo that Congress can delegate to the Judicial Branch rule-making authority to limit federal jurisdiction, the closest it seems to have approached such a delegation is the rule-making power to define when a judgment is final for purpose of appeal under 28 U.S.C. § 2072(c). By taking that small step while enacting nothing to authorize jurisdictional rules on the length of an extension to appeal, Congress showed that the Act's general terms were not intended to make such a delegation.

CONCLUSION

To preserve both justice and the appearance of justice, the Court should reverse the decision of the Seventh Circuit and remand the case with directions to proceed to briefing on the merits.

Respectfully submitted,

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CHARMAINE HAMER,

Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PROFESSOR SCOTT DODSON AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

THE JURISDICTIONAL CHARACTER OF RULE 4(a)(5)(C) DOES NOT RESOLVE THIS APPEAL 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 3, 4

Bowles v. Russell, 551 U.S. 205 (2007) 3, 6, 8

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 4

United States v. Cotton, 535 U.S. 625 (2002) 6

Durfee v. Duke, 375 U.S. 106, 111 (1963) 4

Eberhart v. United States, 546 U.S. 12 (2005) 3

Gonzalez v. Thaler, 565 U.S. 134 (2012) 3, 4

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) (per curiam) 8

Henderson v. Shinseki, 562 U.S. 428 (2011) 3, 4

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2007) 3

Kontrick v. Ryan, 540 U.S. 443 (2004) 3

Manrique v. United States, Slip Op. No. 15-7250 (U.S. Apr. 19, 2017) 6

Mansfield, Coldwater & Lake Michigan Railway v. Swan, 111 U.S. 379 (1884) 4

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) 4

McDonald v. Mabee, 243 U.S. 90 (1917) 4

Morrison v. National Australia Bank, Ltd., 561 U.S. 247 (2010) 3

Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) 3

TABLE OF AUTHORITIES

Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817 (2013) 3

Scarborough v. Principi, 541 U.S. 401 (2004) 3

Sinochem International Co. v. Malaysia International Shipping, 549 U.S. 422 (2007) 4

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 3

Teague v. Regional Commissioner of Customs, 394 U.S. 977 (1969) 7

Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen, 558 U.S. 67 (2009) 3

United States v. Wong, 135 S. Ct. 1625 (2015) 3, 4

RULES AND STATUTES

28 U.S.C. § 2107 6-8

Fed. R. App. P. 4 ..... *passim*

Fed. R. Civ. P. 82 7

OTHER AUTHORITIES

Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619 (2017) 5, 7

Scott Dodson, *Hybridizing Jurisdiction*, 99 Calif. L. Rev. 1437 (2011) 7

Statutory Time Limits to Appeal, 121 Harv. L. Rev. 315 (2007) 8

Transcript of Oral Argument, *John R. Sand & Gravel Co. v. United States*, No. 06-1164 (U.S. Nov. 6, 2007) 8

INTEREST OF *AMICUS CURIAE*

I am a Professor of Law at the University of California Hastings College of the Law, where I teach and write on federal jurisdiction and procedure. I have an academic and pedagogical interest in the clarification of the boundaries, scope, and regulatability of federal jurisdiction. On that basis, I submit this blissfully short brief in support of neither party to aid the Court's consideration of these issues.[1]

SUMMARY OF ARGUMENT

In this case, the district court issued an order extending Petitioner's time to appeal the judgment in her civil case beyond the deadline in Rule 4(a)(5)(C) of the Federal Rules of Appellate Procedure. Petitioner, proceeding *pro se*, then filed her notice of appeal within the order's timeframe but outside the Rule's deadline. Respondents neither objected to this course of action in the district court nor challenged the timeliness of Petitioner's appeal in their initial appellate submission—a Joint Corrected Docketing Statement—to the Court of Appeals.

The precise issues directly confronting the parties and the Court of Appeals were (and are):

> (1) whether the district court had discretion to allow Petitioner to file her notice of appeal beyond the deadline prescribed in the Rule;

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[1] My institutional affiliation is provided for identification purposes only. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund its preparation or submission. All parties have filed blanket consents to amicus briefs in support of neither party.

(2) if not, whether Respondents' conduct disables them and the Court of Appeals from considering the appeal to be untimely under the Rule; and

(3) if not, whether the Court of Appeals may use principles of equity to excuse Petitioner's noncompliance with the Rule.

Rather than analyzing these issues directly through traditional tools of statutory and rule construction, the Court of Appeals instead raised and answered, *sua sponte*, a wholly different question: whether the Rule's deadline is jurisdictional. Answering *that* question in the affirmative, the Court of Appeals then held that the deadline's jurisdictional character automatically resolved each of the three issues in the negative.

The flaw in that reasoning is that answering the jurisdictional question does not resolve the three issues confronting the parties. The Court of Appeals happens to have been correct that Rule 4(a)(5)(C) sets a jurisdictional deadline. But that jurisdictional deadline might still allow for judicial discretion, party waiver, or equitable considerations in a specific case. Resolving whether the deadline could be extended, forfeited, or excused is an exercise in rule construction, not an inexorable result of its jurisdictional character. The Court of Appeals was wrong, therefore, to hold that the Rule's jurisdictional character necessarily resolved the appeal, and this Court should dispose of this appeal—whether by affirmance, reversal, or vacatur—without adopting the Court of Appeals's reasoning.

ARGUMENT

THE JURISDICTIONAL CHARACTER OF RULE 4(a)(5)(C) DOES NOT RESOLVE THIS APPEAL.

1. Nearly two decades ago, this Court, concerned that "[j]urisdiction . . . is a word of many, too many, meanings," embarked on a mission to bring clarity to jurisdictional doctrine. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted).

The Court's ensuing opinions have succeeded in bringing thoughtfulness and attention to questions of jurisdiction. *See, e.g.*, *United States v. Wong*, 135 S. Ct. 1625 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen*, 558 U.S. 67 (2009); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

These opinions have not, however, attempted to clarify the *meaning* of jurisdiction. Instead, they offer a framework for determining whether a limit should be characterized as jurisdictional. This framework offers two main guideposts: "claim-processing rules" are nonjurisdictional, *Kontrick*, 540 U.S. at 455, and a limit is jurisdictional when Congress clearly intends it to be so, *Arbaugh*, 546 U.S. at 514-15.

These guideposts, however, are incompatible. If Congress can deploy the jurisdictional label as it wishes, then Congress can deploy it for claim-processing rules. *See Henderson*, 562 U.S. at 435; *Gonzalez*, 565 U.S. at 169 (Scalia, J., dissenting).

Further, divining Congress's intent on the characterization question has proven difficult, despite the clear-statement rule, almost certainly because Congress rarely considers the question itself when phrasing statutory limits. *Compare, e.g.*, *Wong*, 135 S. Ct. at 1632-33 (claiming textual support for a nonjurisdictional characterization), *with id.* at 1640-42 (Alito, J., dissenting) (claiming the same textual support for a jurisdictional characterization).

The root of these characterization problems is that jurisdiction's *meaning* remains elusive. For many years, courts have defined jurisdiction as a fundamental "power," without which a court can only dismiss for lack of jurisdiction. *See McDonald v. Mabee*, 243 U.S. 90, 91 (1917); *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

But jurisdiction is not a force field; nothing physically prevents a court from issuing a judgment without jurisdiction. Further, this Court has allowed federal courts to resolve cases on nonmerits grounds without first assuring themselves of jurisdiction. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431-32 (2007). And even merits judgments entered by a court without jurisdiction can become binding and enforceable on the parties. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940).

In addition, the definition of "power" (or even just "authority") offers no conceptual difference between jurisdictional limits and nonjurisdictional limits. Both kinds of limits restrict lawful judicial power and authority. A court has no more authority to enter a judgment against a defendant for baldness discrimination under Title VII, or in case filed beyond the limits imposed by a statute of repose, than to enter a judgment against a defendant in a $50,000 diversity case. The jurisdiction-as-power trope does not help distinguish jurisdiction from nonjurisdiction.

2. Jurisdiction's meaning is this: jurisdiction sets boundaries between adjudicative forums. It defines both where a dispute belongs and where it does not. Jurisdiction provides answers to the following questions: When can a case be filed in federal or state court? (Original jurisdiction.) When does a case move from district to appellate court? (Appellate jurisdiction.) Which states' courts can hear a case and which cannot? (Personal jurisdiction.) Jurisdiction erects both the fences that separate adjudicative forums and the gates cases pass through from one forum to another. *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619, 634-37 (2017).

Nonjurisdictional rules, in contrast, limit a court's authority irrespective of other courts. Common examples include the constraints of due process, statutes of limitations, damages caps, the scope of statutory coverage, the power to shift fees, service of process, and the like. *See id.*

Thus, the deadline to file a notice of appeal is different from a statute of limitations—but not because one is about power and the other is not. Rather, the deadline to file a notice of appeal is

jurisdictional because it sets a boundary of authority between courts, *cf. Manrique v. United States*, Slip Op. No. 15-7280, at 3 (U.S. Apr. 19, 2017) ("Filing a notice of appeal transfers adjudicatory authority from the district court to the court of appeals."), while a limitations period is nonjurisdictional because it cabins the authority of a court without regard to other courts.

3. While jurisdiction is *definitionally* distinct from nonjurisdiction, its *effects* are indistinct. It is often said that jurisdictional limits, unlike nonjurisdictional rules, are insusceptible to principles of equity, judicial discretion, and party waiver, and that they must be raised sua sponte by the court. *See United States v. Cotton*, 535 U.S. 625, 630 (2002). But this is simply untrue. A jurisdictional rule, like a nonjurisdictional rule, has whatever effects that particular rule or applicable law provides.

Take, for example, the statutory deadline to file a civil notice of appeal. The deadline is jurisdictional because it establishes a boundary dividing authority over a case between the district and appellate courts. *Cf. Bowles*, 551 U.S. at 209-10 (characterizing the deadline as jurisdictional). Yet the statute specifically gives courts discretion to extend the deadline based upon party conduct and equitable circumstances:

> "The district court may, upon [timely] motion . . . , extend the time for appeal upon a showing of excusable neglect or good cause."

28 U.S.C. § 2107(c).

Although the statutory deadline is jurisdictional, it is not unyielding. Rather, it moves to accommodate judicial discretion ("may"), party conduct ("upon

[timely] motion"), and certain equitable principles ("excusable neglect or good cause"). Section 2107(c) is not unusual; many jurisdictional statutes and doctrines exhibit such effects. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 Calif. L. Rev. 1439, 1457-80 (2011). The resulting jurisdictional boundaries are more circuitous and flexible than straight and rigid, but they are no less jurisdictional.

Could a jurisdictional rule exhibit flexibility *not* specified in its text? The answer depends upon ordinary principles of statutory (or rule) construction. For a rule construed to be confined to its express textual terms, perhaps not; for one construed to incorporate implicit considerations, perhaps yes. *Cf. Teague v. Reg'l Comm'r of Customs*, 394 U.S. 977, 981-84 (1969) (Black, J., dissenting from denial of cert.) (construing the jurisdictional deadline for filing a civil petition for certiorari as implicitly incorporating flexibility for "certain extenuating circumstances"). The point is that a rule's effects depend upon the construction and application of the particular rule, not upon its jurisdictional status.

4. Applying these principles, the Court of Appeals was correct to characterize Rule 4(a)(5)(C) as jurisdictional. The deadline is part of the boundary dividing authority between the district courts and the courts of appeals. It is by definition jurisdictional. *See* Dodson, 105 Geo. L.J. at 639-40.[2]

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[2] Because the definition of jurisdiction is not dependent upon the type of law, it is irrelevant that the deadline is in a Rule rather than a statute. Nevertheless, three additional points on this issue are worth noting for purposes of this case. First, the Federal Rules of Appellate Procedure—unlike Rule 82 of the Federal Rules of Civil Procedure—do not disclaim effects on

Though correctly characterizing the deadline in Rule 4(a)(5)(C) as jurisdictional, the Court of Appeals was wrong to conclude that the deadline's jurisdictional status leads inexorably to rigidity. Just as with 28 U.S.C. § 2107(c), a rule can have whatever effects the rule and applicable law provide, and those effects are independent of its jurisdictional character.

Thus, the question of whether Rule 4(a)(5)(C)'s deadline admits of the kind of flexibility sought by Petitioner—such as through judicial discretion, party waiver, or equitable circumstances—must be determined by direct construction and application of the Rule, not by resort to its jurisdictional character.

The Court of Appeals erred in concluding otherwise, and this Court should not compound its error by affirming solely on the ground that the Rule's deadline is jurisdictional.

(continued...)

jurisdiction. Second, the statutory deadline to appeal a civil case, held jurisdictional by *Bowles*, 551 U.S. at 210-12, postdated Rule 4's appellate deadline and was amended to conform to that Rule deadline, *see Statutory Time Limits to Appeal*, 121 Harv. L. Rev. 315, 322-24 (2007); *cf.* Transcr. of Oral Arg. at 44, *John R. Sand & Gravel Co. v. United States*, No. 06-1164 (U.S. Nov. 6, 2007) (acknowledging this point). Third, much of the "century's worth of precedent and practice" characterizing appellate deadlines as jurisdictional and on which *Bowles* heavily relies, 551 U.S. at 209 n.2, focused on Rule 4 rather than on a statute, *see, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam) (citing only Rules). In sum, deadlines to appeal are jurisdictional because they are deadlines to appeal, not just when they are statutory.

CONCLUSION

For these reasons, this Court should dispose of this case in one of two ways. Ideally, this Court should vacate and remand to allow the Court of Appeals to address the issues directly confronting the parties in the first instance, based on its construction and application of Rule 4(a)(5)(C) to the facts of the appeal. In the alternative, this Court itself can construe and apply the Rule to the issues confronting the parties, and, depending on the outcome, either affirm or reverse the Court of Appeals.

Respectfully submitted,

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